



# PROVIDING FOR THE EFFECTIVE DOMESTIC IMPLEMENTATION OF RIGHTS OF NATURE: A CRITICAL DISCUSSION

by

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Word Count: 24.232

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Submitted to **The University of Cape Town**  
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Date of submission: 09/03/2017

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in International Marine and Environmental Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.



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## **Abstract**

The earth and its inhabitants face significant environmental challenges. So far, the existing legal attempts have failed to address these challenges. The development of the last decades shows that the state of the environment has steadily worsened. Therefore, it is essential to explore new approaches. The concept of rights of nature offers a new legal perspective for creating a more effective approach to environmental regulation than traditional anthropocentric approaches. Rights of nature form part of a relatively new movement called Earth Jurisprudence which calls for a fundamental rethink of law. The concept of rights of nature requires that nature be accorded its own legal right. In order for rights of nature to be effective, their implementation must consider and overcome several procedural and substantive challenges. This dissertation explains the origins, form and nature of existing domestic rights of nature, and then critically analyses the main procedural and substantive challenges for their effective implementation in domestic legal frameworks. The most crucial procedural constraints are standing and representation of rights of nature whereas the most problematic substantive challenges are to define the scope of the right and to balance rights of nature with other rights. Having unpacked these challenges, the dissertation then explores possible solutions to overcome them. It comes to the conclusion that – amongst others - the key prerequisites for an effective implementation are to establish rights of nature as a constitutional right and to concisely define its content. Finally, the dissertation provides a set of guidelines for effectively implementing rights of nature into a domestic legal regime as well as a proposal for the wording of a rights of nature norm.

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## **List of Abbreviations/Acronyms**

NGO - Non-Governmental Organization

NZ - New Zealand

Rio Conference - United Conference on Environment and Development

Rio+20 - United Nations Conference on Sustainable Development

SDGs - Sustainable Development Goals

Tribunal - International Tribunal for the Rights of Nature and Mother Earth

UDHR - Universal Declaration of Human Rights

UDRME - Universal Declaration of the Rights of Mother Earth

UNEP - United Nations Environmental Programme

UN - United Nations

USA/US - United States of America

WCED - World Commission on Environment and Development

WSSD - World Summit on Sustainable Development

2030 Agenda - 2030 Agenda for Sustainable Development

# 1. Introduction

## 1.1 Context

The current state of the environment is shocking. The developments of the last decades show a tremendous increase of environmental destruction.<sup>1</sup> We are heading toward a major planetary catastrophe. Climate change and loss of biodiversity – amongst others - are environmental challenges which threaten the earth and its inhabitants.<sup>2</sup> The challenges are predominantly caused by human activities.<sup>3</sup> From a global perspective, representative populations of mammals, birds, reptiles, amphibians and fish have declined by 52 percent between 1970 and 2010.<sup>4</sup> In other words, on average the species' populations are only about half the size they were 40 years ago. Moreover, there are no signs that the decline will slow down.<sup>5</sup> A massive climate change already took place and has major implications for human well-being.<sup>6</sup> If human activities continue as previously, the global temperature will increase 1.8–4°C by the end of this century.<sup>7</sup> This will have massive consequences, especially for the most vulnerable, poor and disadvantaged people.<sup>8</sup> The impact of climate change, pollution as well as unsustainable land and water use are the main drivers of land degradation. If the present trend continues, approximately 1.8 billion people will be living in countries or regions with absolute water scarcity by 2025.<sup>9</sup> In other words, the earth is at the tipping point in several significant areas.<sup>10</sup>

Human influence on the environment has become so significant that many commentators are of the opinion the world has moved into a new geological period – the “Anthropocene”.<sup>11</sup> Not only the current ecological period is anthropogenic. The law is also fundamentally based on an anthropocentric world view.<sup>12</sup> The predominant anthropocentric approach is ultimately concerned with human beings and human good. Only in rare circumstances are nature and animals considered as relevant to law.<sup>13</sup> Nature is defined as human property that may be used and exploited for human benefit.<sup>14</sup> Based on the

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<sup>1</sup> Magallanes 2016 *NZJPIL* 2-3.

<sup>2</sup> Global Environment Outlook GEO5 6-7.

<sup>3</sup> Global Environment Outlook GEO4 8.

<sup>4</sup> WWF Living Planet Report 2014 4.

<sup>5</sup> Global Environment Outlook GEO5 6.

<sup>6</sup> A Human Health Perspective On Climate Change 2-4.

<sup>7</sup> Global Environment Outlook GEO4 8.

<sup>8</sup> Global Environment Outlook GEO4 8.

<sup>9</sup> Global Environment Outlook GEO4 9-11.

<sup>10</sup> Koons 2012 *LoyLRev* 357.

<sup>11</sup> Maloney & Siemen 2015 *EELJ* 7.

<sup>12</sup> Burdon “The Great Jurisprudence” in Burdon *Exploring Wild Law* 61.

<sup>13</sup> Burdon 2016 *AJLP* 28.

<sup>14</sup> Burdon “The Great Jurisprudence” in Burdon *Exploring Wild Law* 61.

anthropocentric approach, the past fifty years have seen various efforts to respond to the ecological crisis. However, the natural world continues to deteriorate.<sup>15</sup> The existing legal systems are not able to protect the earth and its inhabitants.<sup>16</sup> During the last few decades, a remarkable body of environmental laws, protocols and frameworks has been adopted around the world – on both national and international level. However, despite the good intentions behind the environmental provisions, most of them have failed to fulfil their objectives.<sup>17</sup> In general, environmental law and governance has mostly been ineffective.<sup>18</sup> The existing institutions, especially states and the organisations through which they act, are not able to respond promptly to the challenges we are facing.<sup>19</sup> International Organisations like the UNEP (United Nations Environmental Programme) neither have the capacity nor the authority to challenge the immense environmental problems.<sup>20</sup> International environmental laws are often the result of substantial compromise, are usually soft-law and their enforcement is limited.<sup>21</sup> The states as predominant role players in environmental governance are regularly unwilling to endorse a stronger form of sustainability.<sup>22</sup> Moreover, many states are unable to participate in environmental governance or are incapable of implementing and enforcing environmental laws.<sup>23</sup> In short, the actions of the international community and national governments have not found adequate responses to the tremendous threats.

In light of the current situation and the failing anthropocentric approach, it is essential for environmental law governance to think about new attempts to better protect the environment and its inhabitants through new legal approaches.<sup>24</sup> Most governments still favour a combination of new technology and better application of existing regulatory systems.<sup>25</sup> However, there are other approaches available to respond to the environmental crisis. The theory underlying this dissertation is a relatively new movement or philosophy termed “Earth Jurisprudence”. Earth Jurisprudence is an approach which can develop suitable solutions to protect the environment. The approach is based on the premise that the well-being of earth and all its habitants requires a fundamental rethinking of law and governance.<sup>26</sup> In contrast to the predominant anthropocentric approach, Earth Jurisprudence favours a shift in thinking from a purely

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<sup>15</sup> Maloney & Siemen 2015 *EELJ* 7.

<sup>16</sup> Cullinan “Earth Jurisprudence: From Colonization to Participation” in Starke & Mastny *State of the World – Transforming Cultures – From Consumerism to Sustainability* 143.

<sup>17</sup> Rühls & Jones 2016 *Sustainability* 1-2.

<sup>18</sup> Kotze 2014 *JERL* 141.

<sup>19</sup> Kotze 2014 *JERL* 142.

<sup>20</sup> Kotze 2014 *JERL* 143; Sands *Principles of International Environmental Law* 92.

<sup>21</sup> Rühls & Jones 2016 *Sustainability* 1-2.

<sup>22</sup> Kotze 2014 *JERL* 144.

<sup>23</sup> Sands *Principles of International Environmental Law* 92.

<sup>24</sup> Laitos “Rules of law for use and nonuse of nature” in Voigt *Rule of Law for Nature* 215.

<sup>25</sup> Cullinan “Earth Jurisprudence: From Colonization to Participation” in Starke & Mastny *State of the World – Transforming Cultures – From Consumerism to Sustainability* 143.

<sup>26</sup> Koons 2009 *PSELW* 1.

human-centred to an earth-centred system of law and governance.<sup>27</sup> It suggests an approach to law which seeks to maintain an appropriate natural balance for all life on earth.<sup>28</sup>

An essential element of Earth Jurisprudence is the legal recognition of rights of nature.<sup>29</sup> The recognition requires that nature has its own legal rights. In the last decade, the idea that nature possesses inalienable rights has evolved from a theoretical concept to reality in several countries. In 2008, for instance, Ecuador became the first country to constitutionally guarantee rights of nature.<sup>30</sup> However, there are many practical and theoretical problems to be solved regarding the effective implementation of such rights. Procedural as well as substantive constraints hamper the effective use of rights of nature. So far, much has been written about the ethical arguments regarding rights of nature. However, only a few studies exist focussing on their actual implementation.<sup>31</sup>

## **1.2 Scope and Purpose/Objective**

The purpose of this dissertation is to determine the core content of rights of nature, to tackle existing problems relating to the implementation of rights of nature in domestic legal frameworks and propose possible solutions thereto. The main objective is to develop a way to effectively implement rights of nature through domestic legal frameworks. This dissertation focuses on the domestic scale because the domestic implementation of rights of nature appears to be the most effective option. The dissertation aims to provide a set of guidelines for effectively implementing rights of nature into a domestic legal regime. It illustrates that rights of nature should be implemented as a constitutional rights norm and finally proposes a wording for a domestic constitutional rights of nature norm.

## **1.3 Structure and Methodology**

The dissertation undertakes a critical desk-top study on implemented rights of nature. It seeks to draw from the experience of existing domestic rights of nature in order to identify and analyse the main challenges facing the implementation of such a right. Having unpacked these challenges, it then seeks to explore possible solutions to overcoming them. This desk-top study considers and compares implemented rights of nature, relevant laws, theories, jurisprudence and literature. This will provide the

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<sup>27</sup> Maloney 2015 *GJLHD* 43.

<sup>28</sup> Magallanes 2016 *NZJPIL* 9.

<sup>29</sup> Berry *The Great Work: Our Way Into the Future* 8.

<sup>30</sup> Fish 2013 *SURJ* 6.

<sup>31</sup> Kauffmann & Martin *Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Other Fails* 1.

basis to examine the concept of rights of nature. It also lays the groundwork to identify, categorize and analyse the value of and main areas of concern regarding rights of nature as well as to examine ways to overcome them. For the purpose of critical analysis, this dissertation reflects on implemented rights of nature and other legal sources.

The dissertation is divided into five main parts. Part 2 explains the origins, form and nature of rights of nature. It examines how rights of nature are embedded in the broader theory of Earth Jurisprudence, how the rights evolved and what the content of rights of nature is. In order to determine the scope and nature/form of rights of nature, rights of nature in Ecuador's Constitution<sup>32</sup>, in different ordinances of the United States of America<sup>33</sup> and in the TUTOHU WHAKATUPA Agreement<sup>34</sup> of New Zealand will be analysed. These examples of codified rights of nature have been selected because they each represent different approaches to how rights of nature can be implemented. The three examples of rights of nature will be termed "existing domestic rights of nature" throughout the dissertation. Furthermore, the dissertation uses general categories of the theory of rights to determine the nature of the existing domestic rights of nature. Using Hohfeld's theory of rights as an orientation, the dissertation classifies implemented rights of nature.

For the purpose of a critical review, Part 3 analyses the value of and the constraints facing the implementation of rights of nature. It begins with a critical evaluation of the need for rights of nature. Subsequently, an in-depth examination of the relevant literature and jurisprudence identifies the main areas of concern of the existing domestic rights of nature. The concerns are categorized in three major procedural and three major substantive problem areas. Each of the identified and categorized constraints will be analysed in turn.

Part 4 then examines ways to overcome the constraints facing the implementation of rights of nature. It will be considered on which level rights of nature should be implemented – comparing hard law to soft law, international to domestic implementation as well as different levels of domestic implementation. Additionally, Part 4 examines general requirements for a constitutional rights of nature norm. Finally, this

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<sup>32</sup> Constitution of the Republic of Ecuador, 2008.

<sup>33</sup> Local Law NO. 3-2011, Town of Wales, New York, 2011; Nottingham Water Rights and Local Self Government Ordinance, Town of Nottingham, New Hampshire, 2008; Ordinance to amend the Town Code of Halifax, Town of Halifax, Virginia, 2008. Ordinance 2013-01, Mora County, New Mexico, 2013; Ordinance NO. 115-12, City of Broadview Heights, Ohio, 2012; Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010; Ordinance NO. 612, Tamaqua Borough, Schuylkill County, Pennsylvania, 2006; Ordinance NO. 2011-01, Town of Mountain Lake Park, Maryland, 2011; Ordinance No. 2421, City of Santa Monica, California, 2013; The Shapleigh Code, Town of Shapleigh, Maine, 2009.

<sup>34</sup> Whanganui Iwi and the Crown of New Zealand, TOTOHU WHAKATUPUA Agreement, 2012.

part will discuss how to effectively resolve the main procedural and substantive constraints of the existing domestic rights of nature. In order to do so, the dissertation draws mainly from relevant literature on constitutional rights.

Finally, Part 5 briefly summarises the outcomes of the dissertation. Subsequently, the dissertation offers a guideline of requirements for the implementation of rights of nature on a domestic level. Based on the main outcomes the dissertation furthermore proposes a possible wording for a rights of nature provision as a constitutional rights norm. The guidelines for the effective domestic implementation of rights of nature and the draft formulation of a constitutional rights of nature clause are included as Annex 1 and Annex 2.

## **2. The Concept of Rights of Nature**

### **2.1 Earth Jurisprudence and the Evolution of Rights of Nature**

To understand rights of nature it is essential to briefly examine Earth Jurisprudence and explain the role of rights of nature as part of the philosophy of Earth Jurisprudence.

Earth Jurisprudence is based on the premise that the well-being of earth and its habitants requires a fundamental rethinking of law and of governance.<sup>35</sup> The term was established by Thomas Berry<sup>36</sup> who suggested that “Earth needs a new jurisprudence” and the term “Earth Jurisprudence” was coined.<sup>37</sup> As a philosophy of law and human governance, Earth Jurisprudence analyses the predominant anthropocentric approach and aims to overcome the problems posed by it.<sup>38</sup> In contrast to the anthropocentric approach, Earth Jurisprudence favours a shift in thinking from a purely human-centred to an earth-centred system of law and governance.<sup>39</sup> Advocates for Earth Jurisprudence are of the opinion that the primary cause of the ecological crisis is anthropocentrism.<sup>40</sup> Anthropocentrism stipulates that humans are more important than the rest of the natural world.<sup>41</sup> It underpins the governance structures

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<sup>35</sup> Koons 2009 *PSELW* 1.

<sup>36</sup> Thomas Berry was a Catholic priest of the Passionist order, cultural historian and ecotheologian. He is considered a main theoretical leader of Earth Jurisprudence.

<sup>37</sup> Cullinan *Wild Law* 11.

<sup>38</sup> Burdon 2012 *AJLP* 30.

<sup>39</sup> Maloney 2015 *GJLHD* 43.

<sup>40</sup> Cullinan “A History of Wild Law” in Burdon *Exploring Wild Law* 13; Sheehan “Realizing nature’s rule of law through rights of waterways” in Voigt *Rule of Law for Nature* 223-226.

<sup>41</sup> Maloney 2015 *GJLHD* 43.

of contemporary industrial societies – economics, education, religion and law. The anthropocentric world view promotes the belief that the natural world is a collection of objects for human use.<sup>42</sup>

Earth Jurisprudence follows a different approach. Central to it is the understanding that all things are interconnected and that humans do not stand above of the earth system but are rather part of it.<sup>43</sup> Earth Jurisprudence acknowledges that long-term human well-being depends mainly on the extent to which humans are capable of adjusting to their habitat. This eco-centric approach ideally ensures that human beings behave as “good citizens”. Consequently, human governance systems must rule in a way which does not lead to substantial degradation of the earth.<sup>44</sup>

The judges Radhakrishnan and Prasad of the Supreme Court of India summarize the necessary shift away from anthropocentric principles as the following: “Environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric. Many of our principles like sustainable development, polluter-pays principle, inter-generational equity have their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and non-human has only instrumental value to humans”.<sup>45</sup> In their view humans always take priority over non-humans in current legal systems. Therefore, the judges favour an eco-centric approach which places nature in its centre. This approach follows the idea that human interest does not take automatic precedence and humans have obligations towards non-humans independently of human interest.<sup>46</sup> The judges Radhakrishnan and Prasad conclude that ecocentrism is, in contrast to anthropocentrism, nature-centred and that nature includes both humans and non-humans.<sup>47</sup>

Earth Jurisprudence is based on several principles.<sup>48</sup> Cormac Cullinan<sup>49</sup> determines the principles of Earth Jurisprudence in detail. A critical principal is that the universe is the primary lawgiver. Earth Jurisprudence stipulates that the universe is the highest authority for human society not human laws.<sup>50</sup>

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<sup>42</sup> Maloney 2015 *GJLHD* 43.

<sup>43</sup> Cullinan “Governing People as Members of the Earth Community” in Prugh & Renner *State of the World - Governing for Sustainability* 3.

<sup>44</sup> Cullinan “Governing People as Members of the Earth Community” in Prugh & Renner *State of the World - Governing for Sustainability* 4.

<sup>45</sup> Section 14 T.N Godavarman Thirumulpad Vs. Union of India & Others, 2012.

<sup>46</sup> Section 14 T.N Godavarman Thirumulpad Vs. Union of India & Others, 2012.

<sup>47</sup> Section 14 T.N Godavarman Thirumulpad Vs. Union of India & Others, 2012.

<sup>48</sup> Cullinan 2011 *IUCN AELJ* 42.

<sup>49</sup> Cormac Cullinan is an environmental attorney and author based in Cape Town, South Africa. He is also one of the most important theoretical icons of Earth Jurisprudence.

<sup>50</sup> Cullinan “Earth Jurisprudence: From Colonization to Participation” in Starke & Mastny *State of the World – Transforming Cultures – From Consumerism to Sustainability* 144.

This requires looking at law from the perspective of the whole Earth community.<sup>51</sup> Another principle states “that the Earth community and all the beings that constitute it have fundamental “rights”, including the right to exist, to have a habitat or a place to be, and to participate in the evolution of the community”.<sup>52</sup> Human acts or laws which violate these rights are illegitimate and unlawful.<sup>53</sup> The concept of Earth Jurisprudence further entails that “humans must adapt their legal, political, economic, and social systems to be consistent with the fundamental laws or principles that govern how the universe functions and to guide humans to live in accordance with these”.<sup>54</sup> This means that human governance systems must take into account the interests of the whole Earth community at all times.<sup>55</sup>

The most important principle and the one this dissertation will focus on is the legal recognition of rights of nature.<sup>56</sup> Berry argued that “nature’s rights should be the central issue in any [...] discussion of the legal context of our society”.<sup>57</sup> Rights of nature can be seen as an important subset of the broader Earth Jurisprudence philosophy.<sup>58</sup> They seek to regulate human conduct in a manner which contributes to the health and integrity of the earth instead of dominating and exploiting it.<sup>59</sup> Anthropocentric laws’ define nature as human property and all value and rights are placed on human beings.<sup>60</sup> The concept of rights of nature is based on a different perspective. Natural entities should possess rights in the same way that human beings possess rights - simply by virtue of their existence.<sup>61</sup> The legal status of nature should be regardless of any claims people might have to a right to property. Rights of nature are supposed to include the right to exist, to choose a habitat or a place to be and to participate in the evolution of the Earth community.<sup>62</sup> Granting these rights requires a radical rethinking of the role of our anthropocentric legal system. It is a way of rebalancing the relation between humans and nature and recognizes that nature deserves to be valued for its own inherent worth.<sup>63</sup>

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<sup>51</sup> Cullinan “A History of Wild Law” in Burdon *Exploring Wild Law* 13.

<sup>52</sup> Cullinan “Earth Jurisprudence: From Colonization to Participation” in Starke & Mastny *State of the World – Transforming Cultures – From Consumerism to Sustainability* 144.

<sup>53</sup> Cullinan “Earth Jurisprudence: From Colonization to Participation” in Starke & Mastny *State of the World – Transforming Cultures – From Consumerism to Sustainability* 144.

<sup>54</sup> Cullinan “Earth Jurisprudence: From Colonization to Participation” in Starke & Mastny *State of the World – Transforming Cultures – From Consumerism to Sustainability* 144.

<sup>55</sup> Cullinan “Earth Jurisprudence: From Colonization to Participation” in Starke & Mastny *State of the World – Transforming Cultures – From Consumerism to Sustainability* 144.

<sup>56</sup> Berry *The Great Work: Our Way Into the Future* 8.

<sup>57</sup> Berry *The Great Work: Our Way Into the Future* 8.

<sup>58</sup> Maloney & Siemen 2015 *EELJ* 9

<sup>59</sup> Cullinan 2011 *IUCN AELJ* 41.

<sup>60</sup> Burdon “The Great Jurisprudence” in Burdon *Exploring Wild Law* 62-63

<sup>61</sup> Good 2013 *NELR* 34.

<sup>62</sup> Berry 2002 *RE* 214.

<sup>63</sup> Maloney 2015 *GJLHD* 45.

The idea of moving beyond the anthropocentric approach to improve the treatment of animals and other species is not new.<sup>64</sup> The development of the concept of rights of nature began several decades ago. The concept is built on the cosmologies of many indigenous people, the customary practices of rural people in Africa, India and elsewhere as well as on the writing of scholars' like Aldo Leopold<sup>65</sup> and Thomas Berry.<sup>66</sup>

Already in 1949, Aldo Leopold argued for a new approach. Leopold stated that "[t]here is as yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it".<sup>67</sup> He concluded that "[t]he extension of ethics to this third element in human environment is [...] an evolutionary possibility and an ecological necessity".<sup>68</sup> A few years later, in 1972, Professor Christopher Stone raised the question whether trees should have legal standing. He stated: "Each time there is a movement to confer rights onto some new entity, the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of "us" – those who are holding rights at the time".<sup>69</sup> The US Supreme Court Justice William O. Douglas argued similarly in the *Sierra Club v. Morton* (1972) case. According to his dissenting opinion, natural objects should have their own standing in order to sue for their own protection.<sup>70</sup> Different jurists, such as Berry and Cullinan, developed further Leopold's and Stone's ideas. Berry, for instance, argued in the 1980's that: "[T]he naive assumption that the natural world exists solely to be possessed and used by humans for their unlimited advantage cannot be accepted [...] To achieve a viable human-Earth community, a new legal system must take as its primary task to articulate the conditions for the integral functioning of the Earth process, with special reference to a mutually enhancing human-Earth relationship".<sup>71</sup>

A few decades after its theoretical introduction, lawmakers are beginning to take the assumptions of the above elaborated jurists seriously.<sup>72</sup> Rights of nature are simultaneously developing around the globe.<sup>73</sup> They are incorporated in jurisdictions in Ecuador and Bolivia as well as in the United States and

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<sup>64</sup> Van Rooyen Incorporating an Earth Jurisprudence approach into South African environmental law for the protection of endangered species: Options and challenges 41.

<sup>65</sup> Aldo Leopold was an American author, philosopher, conservationist and environmentalist. He was influential in the development of modern environmental ethics and in the movement for wilderness conservation.

<sup>66</sup> Cullinan "A History of Wild Law" in Burdon *Exploring Wild Law* 22.

<sup>67</sup> Leopold *A Sandy County Almanac* 239.

<sup>68</sup> Leopold *A Sandy County Almanac* 239.

<sup>69</sup> Stone 1972 *SCLR* 455.

<sup>70</sup> *Sierra Club v. Morton*, 405 U.S. 727, 1972.

<sup>71</sup> Berry *The Dream of the Earth* 5-6.

<sup>72</sup> Burdon 2010 *AHR* 71.

<sup>73</sup> Kauffmann & Martin Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Other Fails 2.

New Zealand.<sup>74</sup> Moreover, a growing international movement of people and organisations is advocating for an earth-centred law and governance approach.<sup>75</sup> In 2010, the UDRME (Universal Declaration of the Rights of Mother Earth) was proclaimed at the World Peoples` Conference on Climate Change and the Rights of Mother Earth.<sup>76</sup> The declaration acknowledges that Earth is an indivisible, living community of interrelated and interdependent beings with inherent rights.<sup>77</sup> The UDRME is used as guidance in numerous initiatives and organisations all around the world.<sup>78</sup> Rights of nature were also addressed on various other occasions and in a variety of documents, such as Supreme Court decisions in India<sup>79</sup>, Pope Francis` new encyclical<sup>80</sup> and UN General Assembly resolutions<sup>81</sup>. In short, the concept of rights of nature has been widely acknowledged. But what exactly are rights of nature?

## 2.2 Concept of Rights of Nature

In order to answer this question, it is necessary to examine the background, the scope and the nature/form of the existing domestic rights of nature. Rights of nature have been practically implemented of the local, national and international level. Since the dissertation concentrates on the national implementation of rights of nature, this section analyses three main examples of implemented rights on a domestic level – Ecuador`s Constitution<sup>82</sup>, different ordinances of the US<sup>83</sup> and the TUTOHU WHAKATUPA Agreement of New Zealand<sup>84</sup>. Despite some differences between these codifications it will be shown that the background, the basic scope and the nature/form of the implemented rights are similar.

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<sup>74</sup> Cullinan "Governing People as Members of the Earth Community" in Prugh & Renner State of the World - Governing for Sustainability 6-7.

<sup>75</sup> Maloney 2015 GJLHD 44.

<sup>76</sup> Cullinan "Governing People as Members of the Earth Community" in Prugh & Renner State of the World - Governing for Sustainability 6.

<sup>77</sup> Cullinan "Governing People as Members of the Earth Community" in Prugh & Renner State of the World - Governing for Sustainability 6.

<sup>78</sup> Cullinan "Governing People as Members of the Earth Community" in Prugh & Renner State of the World - Governing for Sustainability 7.

<sup>79</sup> T.N Godavarman Thirumulpad Vs. Union of India & Others, 2012.

<sup>80</sup> Encyclical Letter *Laudatio si'* of the Holy Father Francis 35.

<sup>81</sup> United Nations General Assembly Resolution A/RES/70/208.

<sup>82</sup> Constitution of the Republic of Ecuador, 2008.

<sup>83</sup> Local Law NO. 3-2011, Town of Wales, New York, 2011; Nottingham Water Rights and Local Self Government Ordinance, Town of Nottingham, New Hampshire, 2008; Ordinance to amend the Town Code of Halifax, Town of Halifax, Virginia, 2008; Ordinance 2013-01, Mora County, New Mexico, 2013; Ordinance NO. 115-12, City of Broadview Heights, Ohio, 2012; Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010; Ordinance NO. 612, Tamaqua Borough, Schuylkill County, Pennsylvania, 2006; Ordinance NO. 2011-01, Town of Mountain Lake Park, Maryland, 2011; Ordinance No. 2421, City of Santa Monica, California, 2013; The Shapleigh Code, Town of Shapleigh, Maine, 2009.

<sup>84</sup> Whanganui Iwi and the Crown of New Zealand, TOTOHU WHAKATUPUA Agreement, 2012.

## 2.2.1 Background to Existing Domestic Rights of Nature

Ecuador's Constitution, various ordinances of the US (United States of America) and the TUTOHU WHAKATUPA Agreement were established since 2006. Most of the implemented rights are based on similar foundations and objectives: They seek to protect the environment from economic interests and bad governance.

In the US, several communities passed local ordinances which provide community self-determination and rights of nature.<sup>85</sup> The first appearance of codified rights of nature anywhere in the world was on the municipal level in Tamaqua Borough, USA, in 2006.<sup>86</sup> Four years later, in 2010, the city of Pittsburgh became the first US city adopting a rights of nature ordinance. So far, municipalities in Ohio<sup>87</sup>, Pennsylvania<sup>88</sup>, New Hampshire<sup>89</sup>, Maine<sup>90</sup>, New York<sup>91</sup>, Virginia<sup>92</sup>, New Mexico<sup>93</sup>, Maryland<sup>94</sup> and California<sup>95</sup> have adopted at least one ordinance which proclaims rights for their local environment. The state Colorado intends to draft an amendment to the state Constitution that introduces state-wide rights for nature.<sup>96</sup> All ordinances have similar origins and backgrounds: The communities fight practices which endanger the environment and human well-being. The ordinances serve as legal tools protecting the communities. Corporations and a state which tolerates environmental degradation are perceived as main enemies.<sup>97</sup> The ordinance of the Tamaqua Borough states: "Tamaqua Borough has been rendered powerless by the state and federal government to prohibit the land application of sewage sludge by persons that comply with all applicable laws and regulations. In order to protect the health, safety, and welfare of the residents of Tamaqua Borough, the soil, groundwater, and surface water, the environment and its flora and fauna, and the practice of sustainable agriculture, the Borough finds it necessary to ban corporations and other limited liability entities from engaging in the land application of sewage sludge".<sup>98</sup>

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<sup>85</sup> Maloney & Siemen 2015 *EELJ* 16.

<sup>86</sup> Tanasescu "Local, National, and International Rights of Nature" in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 107.

<sup>87</sup> Section 1 d Ordinance NO. 115-12, City of Broadview Heights, Ohio, 2012.

<sup>88</sup> 618.03 b Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010.

<sup>89</sup> Section 5.1 Nottingham Water Rights and Local Self Government Ordinance, Town of Nottingham, New Hampshire, 2008.

<sup>90</sup> Article 2 § 99-12 The Shapleigh Code, Town of Shapleigh, Maine, 2009.

<sup>91</sup> Section 4 (b) Local Law NO. 3-2011, Town of Wales, New York, 2011.

<sup>92</sup> Article VII Section 30-156.7. Ordinance to amend the Town Code of Halifax, Town of Halifax, Virginia, 2008.

<sup>93</sup> Section 4.3. Ordinance 2013-01, Mora County, New Mexico, 2013.

<sup>94</sup> Article 4 Section 2 Ordinance NO. 2011-01, Town of Mountain Lake Park, Maryland, 2011.

<sup>95</sup> Chapter 4.75.020(c) Ordinance No. 2421, City of Santa Monica, California, 2013.

<sup>96</sup> Tanasescu "Local, National, and International Rights of Nature" in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 117.

<sup>97</sup> Tanasescu "Local, National, and International Rights of Nature" in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 108-117.

<sup>98</sup> Section 3 Ordinance NO. 612, Tamaqua Borough, Schuylkill County, Pennsylvania, 2006.

The specific reason for the introduction of the ordinances differs from community to community. The ordinance of the Tamaqua Borough<sup>99</sup> fights against the application of sewage sludge whilst the ordinance of the city of Pittsburgh<sup>100</sup> addresses fracking. The ordinance of the city of Pittsburgh, for instance, states: “The City Council of Pittsburgh finds that the commercial extraction of natural gas in the urban environment of Pittsburgh poses a significant threat to the health, safety, and welfare of residents and neighbourhoods within the City. [...] Thus, the City Council hereby adopts this ordinance, which bans commercial extraction of Marcellus Shale natural gas within the City of Pittsburgh, creates a Bill of Rights for the residents and communities of the City, and removes certain legal powers from gas extraction corporations operating within the City of Pittsburgh”.<sup>101</sup> Other ordinances are primarily focused on water<sup>102</sup>, mining<sup>103</sup> or sustainability<sup>104</sup>.

Shortly after the first legal appearance of rights of nature in US ordinances, Ecuador became the world’s first country to codify rights of nature in constitutional history.<sup>105</sup> In 2008, a majority of citizens approved the new Constitution<sup>106</sup> which codifies rights of nature. The seventh chapter in Part 2 of the Constitution is dedicated to “Rights of Nature”. Like the US municipalities, the Ecuadorian government aimed at a better protection of the environment. Art. 71 of Ecuador’s Constitution stipulates that “[t]he State will motivate natural and juridical persons as well as collectives to protect nature; it will promote respect towards all the elements that form an ecosystem”. Art. 72 of Ecuador’s Constitution further states: “Nature has the right to restoration. This integral restoration is independent of the obligation on natural and juridical persons or the State to indemnify the people and the collectives that depend on the natural systems. In the cases of severe or permanent environmental impact, including the ones caused by the exploitation on non-renewable natural resources, the State will establish the most efficient mechanisms for the restoration, and will adopt the adequate measures to eliminate or mitigate the harmful environmental consequences.” Art. 73 of Ecuador’s Constitution finally lays down that “[t]he State will apply precaution and restriction measures in all the activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles”. The rights especially intend to protect the environment against corporations which have been using Ecuador as a dumping ground and the oil industry which caused serious degradation.<sup>107</sup>

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<sup>99</sup> Section 3 Ordinance NO. 612, Tamaqua Borough, Schuylkill County, Pennsylvania, 2006.

<sup>100</sup> 618.01 Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010.

<sup>101</sup> 618.01 Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010.

<sup>102</sup> The Shapleigh Code, Town of Shapleigh, Maine, 2009.

<sup>103</sup> Ordinance to amend the Town Code of Halifax, Town of Halifax, Virginia, 2008.

<sup>104</sup> Ordinance No. 2421, City of Santa Monica, California, 2013.

<sup>105</sup> Kauffmann & Martin Testing Ecuador’s Rights of Nature: Why Some Lawsuits Succeed and Others Fail 1.

<sup>106</sup> Constitution of the Republic of Ecuador, 2008.

<sup>107</sup> Burdon 2010 *AHR* 74; Rühls & Jones 2016 *Sustainability* 10.

The TUTOHU WHAKATUPA Agreement<sup>108</sup> was concluded in 2012. It is a contract between the Whanganui Iwi, the indigenous community that has historically inhabited the Whanganui river, and the Crown. The Crown fulfils a number of important political, legal and symbolic functions in NZ (New Zealand). Its definition is obtuse and its meanings vary according to the context.<sup>109</sup> As a relic of British colonisation, the concept of the Crown stands for the New Zealand government acting as a legal entity.<sup>110</sup> In general, the Crown is a corporation that represents the legal embodiment of executive governance. The TUTOHU WHAKATUPA Agreement recognises the Whanganui river as a living entity with its own rights.<sup>111</sup> The TUTOHU WHAKATUPA Agreement is the result of the longest-standing legal dispute in New Zealand's history and the desire of the Whanganui Iwi to protect their sacred river.<sup>112</sup> In contrast to the ordinances in the US and the Constitution in Ecuador, the motivation for the TUTOHU WHAKATUPA Agreement was not the fight against corporations. In fact, the motivation was the colonial history and the fight against a colonial government. The Whanganui Iwi claimed that the Crown did not respect their granted rights regarding the river.<sup>113</sup> The Agreement recognizes the special relationship between the Whanganui Iwi and the Whanganui river: "Whanganui Iwi have common links in two principal ancestors, Paerangi and Ruatipua. Ruatipua draws lifeforce from the headwaters of the Whanganui River on Mount Tongariro and its tributaries which stretch down to the sea. The connection of the tributaries to form the Whanganui River is mirrored by the interconnection through whakapapa of the descendants of Ruatipua and Paerangi. [...] Whanganui Iwi view the Whanganui River as a living being, Te Awa Tupua; an indivisible whole incorporating its tributaries and all its physical and metaphysical elements from the mountains to the sea. The enduring concept of Te Awa Tupua - the inseparability of the people and River – underpins the desire of Whanganui Iwi to care, protect, manage and use the Whanganui River through the kawa and tikanga maintained by the descendants of Ruatipua and Paerangi".<sup>114</sup>

In short, existing domestic rights of nature have a similar background. They mainly seek to protect the environment against corporations, a state which does not protect the environment and/or the colonial history.

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<sup>108</sup> Whanganui Iwi and the Crown of New Zealand, TUTOHU WHAKATUPA Agreement, 2012.

<sup>109</sup> Shore & Kawharu 2014 *Sites* 17.

<sup>110</sup> Shore & Kawharu 2014 *Sites* 17.

<sup>111</sup> Hsiao 2012 *EPL* 371.

<sup>112</sup> Hsiao 2012 *EPL* 371-373

<sup>113</sup> Tanasescu "Local, National, and International Rights of Nature" in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 120.

<sup>114</sup> 1.1-1.3 of the TUTOHU WHAKATUPA Agreement.

## 2.2.2 The Scope of the Existing Domestic Rights of Nature

This part examines and compares the scope of the existing domestic rights of nature from two perspectives. Firstly, it considers their scope of protection and application. Secondly, it reflects on the issue of standing.

### 2.2.2.1 Scope of Rights

Rights of nature in Ecuador's Constitution, in the ordinances of the US municipalities and in the TUTOHU WHAKATUPA Agreement have a similar scope and structure. The granted rights to the natural environment contain two different claims: a moral obligation to respect nature's value and a legal claim. All mentioned codifications aim to protect the environment as well as the humans who live in the environment.<sup>115</sup> However, their scope of protection and application differs. Rights of nature in Ecuador's Constitution have a very wide scope of protection whilst the scope of the US ordinances and the TUTOHU WHAKATUPA Agreement is more specific.

Ecuador's Constitution treats environment as a right-bearing entity equal to humans.<sup>116</sup> Art. 71 - Art. 74 of Ecuador's Constitution are dedicated to ensuring substantive rights of nature. Art. 71 of the Constitution stipulates: "Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution". Hence, Art. 71 of Ecuador's Constitution lays down that nature's right entails four things: respect for nature's existence, maintenance, integrity and regeneration.<sup>117</sup> Even though the Constitution does not define "nature", the term accrues a wide scope since "nature" is an extremely broad concept.<sup>118</sup>

The scope of protection of the ordinances in US municipalities is less broad. The scope is often determined by a standardized list of rights. In many of the post-2010 Pennsylvania ordinances, the following standard formulation is used:<sup>119</sup> "Rights of Natural Communities. Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems,

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<sup>115</sup> Tanasescu "Local, National, and International Rights of Nature" in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 108-109.

<sup>116</sup> Whittemore 2011 *PRLPJ* 660.

<sup>117</sup> Rühls & Jones 2016 *Sustainability* 11.

<sup>118</sup> Whittemore 2011 *PRLPJ* 669.

<sup>119</sup> Tanasescu "Local, National, and International Rights of Nature" in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 110.

possess inalienable and fundamental rights to exist and flourish within the City [...]”.<sup>120</sup> The scope of rights of nature in US ordinances is therefore not clearly limited to include water systems only. However, water systems are specifically listed as nature to be protected. The key element of the US ordinances is the right of life. The rights of nature are part of a package of rights. The right of access and use of natural resources as well as the right to self-government often are also part of the local regulations.<sup>121</sup> This is similar to the Ecuadorian Constitution which also offers a package of rights.

The TUTOHU WHAKATUPA Agreement is, in contrast, more specific and limits its scope to the Whanganui river. Rights of nature are only granted to the “Te Awa Tupua”.<sup>122</sup> The Agreement defines Te Awa Tupua as the whole river: “Whanganui Iwi and the Crown have reached agreement on the following key elements of the Te Awa Tupua (“whole of River”)”<sup>123</sup>. This includes all elements of the river, such as the river bed, its length and trajectory.<sup>124</sup> The Te Awa Tupua also compromises the fundamental connection between the well-being of the people and the river itself.<sup>125</sup>

### 2.2.2.2 Standing and Representation

Ecuador’s Constitution, ordinances of US municipalities and the TUTOHU WHAKATUPA Agreement also have a similar approach to the important issue of standing. The rights of nature not only aim to protect nature but they also explicitly list nature, natural communities, ecosystems and rivers as legal persons and accord them legal standing. Central to the provisions is the idea that nature has standing to initiate legal actions in its own name and for its own benefit.<sup>126</sup> Despite the general common approach, the specific provisions governing standing and representation of rights of nature are differently formulated. Ecuador’s Constitution has a general approach in respect of its standing. In contrast, the ordinances of US municipalities and the TUTOHU WHAKATUPA Agreement are more specific regarding the question as to who has standing and who may represent rights of nature.

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<sup>120</sup> 618.03 Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010.

<sup>121</sup> Tanasescu “Local, National, and International Rights of Nature” in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 117.

<sup>122</sup> 2.1 of the TUTOHU WHAKATUPUA Agreement.

<sup>123</sup> 2.1 of the TUTOHU WHAKATUPUA Agreement.

<sup>124</sup> Tanasescu “Local, National, and International Rights of Nature” in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 120.

<sup>125</sup> Tanasescu “Local, National, and International Rights of Nature” in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 121.

<sup>126</sup> Tanasescu “Local, National, and International Rights of Nature” in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 109.

In general, Ecuador's Constitution grants "nature" its own rights.<sup>127</sup> However, the Constitution does not regulate clearly who may seek action for the protection of nature's right before court.<sup>128</sup> Art. 71 of the Constitution says that "every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms". The wording of the Constitution suggests that a wider range of people may represent nature in legal disputes.<sup>129</sup> Since there are no clear guidelines for the representation of nature, courts will be required to define them through their jurisprudence.<sup>130</sup>

The ordinances in the US grant natural communities and ecosystems, such as wetlands and rivers, "inalienable and fundamental rights" and standing. However, most of the ordinances limit the number of people who possess legal standing to enforce rights on behalf of the natural communities and ecosystems to the residents of the city or the borough.<sup>131</sup> Moreover, some ordinances have expressly removed the rights of corporations to challenge rights of nature and deny corporations the legal authority to do so.<sup>132</sup> The ordinance of the city of Pittsburgh, for instance, stipulates: "Corporations in violation of the prohibition against natural gas extraction, or seeking to engage in natural gas extraction shall not have the rights of "persons" afforded by the United States and Pennsylvania Constitutions, nor shall those corporations be afforded the protections of the commerce or contracts clauses within the United States Constitution or corresponding sections of the Pennsylvania Constitution. [...] Corporations engaged in the extraction of natural gas shall not possess the authority or power to enforce State or federal preemptive law against the people of the City of Pittsburgh, or to challenge or overturn municipal ordinances adopted by the City Council of Pittsburgh".<sup>133</sup>

The TUTOHU WHAKATUPA Agreement is even more specific than the municipal ordinances in the US. It clarifies that the "Te Awa Tupua" is recognized as a legal entity.<sup>134</sup> The legal standing is only granted to the river as a legal entity and not to nature as such.<sup>135</sup> In other words, only the river has awarded rights of personhood.<sup>136</sup> The agreement stipulates that "the creation of a legal personality for the River is

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<sup>127</sup> Art. 71(1) of Ecuador's Constitution.

<sup>128</sup> Rühls & Jones 2016 *Sustainability* 11-12.

<sup>129</sup> Rühls & Jones 2016 *Sustainability* 12.

<sup>130</sup> Rühls & Jones 2016 *Sustainability* 12.

<sup>131</sup> 618.03 (b) Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010; 7.6 Ordinance NO. 612, Tamaqua Borough, Schuylkill County, Pennsylvania, 2006.

<sup>132</sup> Magallanes 2016 *NZJPIL* 11.

<sup>133</sup> 618.04 Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010.

<sup>134</sup> 2.6 of the TOTOHU WHAKATUPUA Agreement.

<sup>135</sup> Tanasescu "Local, National, and International Rights of Nature" in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 123.

<sup>136</sup> Tanasescu "Local, National, and International Rights of Nature" in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 120.

intended to [...] enable [it] to have legal standing in its own rights”.<sup>137</sup> The river as a legal person with its own rights may potentially bring claims against anyone for damages of its physical and spiritual wellbeing.<sup>138</sup> Thereby, the river acts through its guardians. The TUTOHU WHAKATUPA Agreement contains a guardianship approach which is termed “Te Pou Tupua” (guardian). The Te Pou Tupua is formed of two representatives, one appointed by the Crown and one by “all iwi with interest in the Whanganui River”.<sup>139</sup> The guardians are bound to act on behalf of the river and its interest.<sup>140</sup>

### 2.2.3 The Nature/Form of Existing Domestic Rights of Nature

To identify the form/nature of the rights of nature this section categorises the existing domestic rights of nature. This section draws particularly from Hohfeld’s analysis of legal rights as a means of categorisation. Although the Hohfeldian scheme is controversial, it has the advantage of granting as much clarity as possible.<sup>141</sup> Hohfelds concept of rights is based on the kinds of relations a right may provide. It generally distinguishes between four types of jural relations: claim-rights, liberty-rights, powers and immunities.<sup>142</sup> The four types cannot be delimited exactly and a right may consist of a cluster of rights.<sup>143</sup> Hohfeld characterises a right as a relation between parties.<sup>144</sup> Every type of right has a correlative which describes the position of the other party in the relationship.<sup>145</sup> According to Hohfeld, the following correlatives exist: claim-right and duty, liberty-right and no-right, power and liability as well as immunity and disability.<sup>146</sup> Hohfeld also uses opposites to distinguish the four types of rights. Opposites describe the condition contrary to the type of right in question: claim-right and no-right, liberty-right and duty, power and disability, as well as immunity and liability.<sup>147</sup>

The existing domestic rights of nature can be categorized as a mix of positive and negative claim-rights. A claim-right is a right entitling the right holder to claim the corresponding duty from the obligated person. The content of claim-rights can differ in many aspects. A useful distinction is that drawn between positive and negative claim rights. Positive claim-rights are rights entitling to specific services and goods. They

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<sup>137</sup> 2.7 of the TOTOHU WHAKATUPUA Agreement.

<sup>138</sup> Hsiao 2012 *EPL* 375.

<sup>139</sup> 2.19 of the TOTOHU WHAKATUPUA Agreement.

<sup>140</sup> 2.18 of the TOTOHU WHAKATUPUA Agreement.

<sup>141</sup> Tanasescu “The Anatomy of Rights” in Tanasescu *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* 56.

<sup>142</sup> Wenar *PPA* 224-226.

<sup>143</sup> Jones *Rights* 13-14.

<sup>144</sup> Jones *Rights* 13-14.

<sup>145</sup> Jones *Rights* 13.

<sup>146</sup> Burdon 2010 *AHR* 84.

<sup>147</sup> Edmundson *An Introduction to Rights* 90-91.

are termed positive because they contain a positive response on those who owe a duty. Positive claim-rights can be, for instance, the right to receive compensation and the right to be protected.<sup>148</sup> Negative claim-rights are rights to non-interference. They are termed negative because they only require restraint or omission instead of an action.<sup>149</sup>

Ecuador's Constitution contains a mix of positive and negative claim-rights. Art. 71 of Ecuador's Constitution includes a negative claim-right. It grants the right to not interfere in the basic processes of nature. The Constitution stipulates that "nature [...] has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution".<sup>150</sup> In doing so, third parties are obliged not to disrupt the fundamental functions and processes of nature. At the same time, Art. 72 of Ecuador's Constitution formulates a positive claim-right: "Nature has the right to restoration". This formulation establishes a positive obligation on other parties to compensate damages to the environment.

The US ordinances also grant negative and positive claim-rights. The Pittsburgh ordinance, for instance, puts the obligation on other parties not to restrict the existence of ecosystems: "Natural communities and ecosystems [...] possess inalienable and fundamental rights to exist and flourish".<sup>151</sup> The ordinance of the Tamaqua Borough is formulated slightly differently: "It shall be unlawful for any corporation or its directors, officers, owners, or managers to interfere with the existence and flourishing of natural communities or ecosystems, or to cause damage to those natural communities and ecosystems".<sup>152</sup> The duty requires a conduct which does not endanger natural communities and ecosystems. Activities that interfere with or violate these rights are prohibited. Furthermore, the ordinances contain positive claim-rights in form of compensation. They contain rights entitling to claim damages in order to provide for the restoration of nature.<sup>153</sup> Additionally, US ordinances grant certain claims to natural communities and ecosystems. The Pittsburgh ordinance, for example, states that "all residents, natural communities and ecosystems in Pittsburgh possess a fundamental and inalienable right to sustainably access, use, consume, and preserve water drawn from natural water cycles".<sup>154</sup>

Finally, the TUTOHU WHAKATUPA Agreement also includes positive and negative claim-rights. The wording of the Agreement is not as explicit as Ecuador's Constitution or most of the US ordinances.

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<sup>148</sup> Jones *Rights* 14-15.

<sup>149</sup> Jones *Rights* 15.

<sup>150</sup> Art. 71(1) of Ecuador's Constitution.

<sup>151</sup> 618.03 Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010.

<sup>152</sup> Section 7.6 Ordinance NO. 612, Tamaqua Borough, Schuylkill County, Pennsylvania, 2006.

<sup>153</sup> CELDF Rights of Nature FAQs.

<sup>154</sup> 618.03 Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010.

However, an interpretation of the contract demonstrates that it contains both rights. The negative claim-right may be derived from the key principle of the Record of Understanding of the TUTOHU WHAKATUPA Agreement: “Te Mana o Te Awa - recognising, promoting and protecting the health and wellbeing of the River and its status as Te Awa Tupua”. The principle “Te Mana o Te Awa” acknowledges that the Whanganui river has its right to exist and that activities which violate these rights are prohibited. In addition, the contract establishes claims against the Crown and private entities to compensate for damages to the physical and spiritual wellbeing of the river.<sup>155</sup> Hence, it also provides positive claim-rights.

### **2.3 Summary of Key Lessons**

Earth Jurisprudence provides a fundamentally different approach compared to the predominant anthropocentric world view. Central to the governance approach is the idea that all things are interconnected and that humans do not stand above of the system earth but are part of it. The most important subset of Earth Jurisprudence is the legal recognition of rights of nature. The concept of rights of nature acknowledges that nature possesses inalienable rights by granting natural entities legal claims. The main idea is that nature has standing to initiate legal actions in its own name and for its own benefit. The analysis of three main examples of implemented rights of nature on a domestic level – Ecuador’s Constitution, different ordinances of the US and the TUTOHU WHAKATUPA Agreement of New Zealand – shows that the main purpose of rights of nature is the protection of the environment and the humans who live in it. Their aim is to protect the environment from detrimental economic interests and bad governance. The existing domestic rights of nature can be categorized as a mix of positive and negative claim-rights: they stipulate both a positive duty to pay compensation for damages as well as the negative duty not to interfere in nature’s rights. However, the existing domestic rights of nature not only differ in the manner they are implemented – constitution, ordinance and agreement. They are also distinguished by their scope and the way nature is legally represented. Ecuador’s Constitution contains a wide approach by granting national wide nature rights which may be represented by a wide range of people. The ordinances of the US have a more restricted approach. They only apply locally, grant rights to entities according to a standardized list and the representation of the rights is limited. The scope of the TUTOHU WHAKATUPA Agreement is restricted even further, namely to the Whanganui river. The river may be legally represented only by specified representatives.

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<sup>155</sup> Hsiao 2012 *EPL* 375.

### 3. Opportunities and Constraints Associated with Existing Domestic Rights of Nature

Valuable lessons can be garnered from an evaluation of the experience of jurisdictions which have already sought to implement rights of nature in a domestic context. The existing domestic rights of nature provisions offer distinct advantages but also face various practical and theoretical problems. Part 3 analyses the main opportunities and constraints associated with existing domestic rights of nature. Firstly, section 3.1 determines the value of rights of nature. This analysis is particularly important because the implementation of rights of nature is only useful if they expand the protection of the environment. Section 3.2 then identifies the main procedural and substantive constraints of the existing domestic rights of nature - focussing again on the constitutional rights in Ecuador, rights of nature in ordinances of the US and the TUTOHU WHAKATUPA Agreement of New Zealand.

#### 3.1 Opportunities Provided by Rights of Nature

Rights of nature are often the target of criticism. Various commentators are of the opinion that a nature right approach does not further the goals of environmental protection compared to the existing legal systems.<sup>156</sup> One point of criticism is that conventional legal notions can achieve the same results as rights of nature.<sup>157</sup> The argument is based on the assumption that the real problem is not the legal concept itself but a lack of political will.<sup>158</sup> Another point of critique is that Earth Jurisprudence only constitutes a “noble lie” and might not be the most effective strategy to face current challenges.<sup>159</sup> However, the implementation of rights of nature appear to strengthen the protection of the environment. Rights of nature have specific advantages which are illustrated by two main aspects. Firstly, rights of nature provide a larger protection for nature than conventional legal approaches. Secondly, they promote a paradigm shift of perceptions in human society.

##### 3.1.1 Broader Environmental Protection

A main failure of modern environmental laws is to not effectively stop environmental degradation and the forces driving it. Instead of reversing the evolution of degradation, the current legal systems appear to perpetuate legalizing pollution and unsustainable use of natural resources.<sup>160</sup> Rights of nature add

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<sup>156</sup> Morgan 2015 *NZJPIL* 66-67.

<sup>157</sup> Elder 1984 *OHLJ* 291.

<sup>158</sup> Elder 1984 *OHLJ* 291.

<sup>159</sup> Morgan 2015 *NZJPIL* 88.

<sup>160</sup> Sheehan “Realizing nature’s rule of law through rights of waterways” in Voigt *Rule of Law for Nature* 222-223.

important tools to the existing legal armoury of environmental law. They express values which extend the protection of the environment.

### 3.1.1.1 Rights of Nature vs Sustainable Development

Rights of nature formulate a higher standard of protection than previous environmental protection movements. The previous environmental protection movements have been mainly associated with the achievement of sustainable development.<sup>161</sup> The concept of sustainable development is a concept which underpins the international and national attempts to deal with challenges like climate change, poverty and pollution.<sup>162</sup> The concept calls for a convergence between three interrelated pillars or dimensions.<sup>163</sup> These pillars are economic development, social equity and environmental protection. The concept of sustainable development may be understood as a guiding principle, a process or a framework to balance those three dimensions.<sup>164</sup>

The meaning of the term sustainable development has evolved constantly and was influenced by a number of UN (United Nations) summits on the international stage.<sup>165</sup> The WCED (World Commission on Environment and Development) introduced a widely used definition of sustainable development when publishing the Brundtland Report in 1987.<sup>166</sup> The report postulated that sustainable development is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>167</sup> Five years later, the Rio Conference (United Conference on Environment and Development) strongly influenced the direction of sustainable development by establishing an emphasis on the environmental issues.<sup>168</sup> A decade later, the WSSD (2002 World Summit on Sustainable Development) in Johannesburg brought along a shift from environmental issues toward social and economic development.<sup>169</sup> The Rio+20 (United Nations Conference on Sustainable Development), held in Rio in 2012, confirmed the shift of the concept’s focus towards economic issues. Initiated by the Rio+20

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<sup>161</sup> Good 2013 *NELR* 37.

<sup>162</sup> Glazewski & Du Toit *Environmental Law in South Africa* 5.9.

<sup>163</sup> Drexhage & Murphy *Sustainable Development: From Brundtland to Rio 2012* 2; Strange & Bayley *Sustainable Development: Linking Economy, Society, Environment* 27.

<sup>164</sup> Drexhage & Murphy *Sustainable Development: From Brundtland to Rio 2012* 2; Strange & Bayley *Sustainable Development: Linking Economy, Society, Environment* 27.

<sup>165</sup> The main documents of the UN summits are the following: *Our Common Future: Report of the World Commission on Environment and Development A/42/427*; *Rio Declaration on Environment and Development; Agenda 21; The Future We Want A/RES/66/288*; *United Nations Millennium Declaration A/RES/55/2*; *2030 Agenda for Sustainable Development A/RES/70/1*.

<sup>166</sup> *Our Common Future: Report of the World Commission on Environment and Development* 41.

<sup>167</sup> *Our Common Future: Report of the World Commission on Environment and Development* 41.

<sup>168</sup> Rieu-Clarke *International Law and Sustainable Development* 41.

<sup>169</sup> Drexhage & Murphy *Sustainable Development: From Brundtland to Rio 2012* 8.

Conference, the 2030 Agenda (2030 Agenda for Sustainable Development) introduced a set of 17 SDGs (Sustainable Development Goals) and changed the perception of sustainable development once again by laying down a vision of goal-orientated sustainable development through global partnership.<sup>170</sup>

The concept of sustainable development has several shortcomings. Firstly, the above elaborated evolution of the concept of sustainable development shows that there is an ongoing dialogue about the content and the emphasis of the concept. Yet a fixed and clear definition of the concept of sustainable development does not exist.<sup>171</sup> The term appears elusive. As a result, some observer's even consider the term "sustainable development" to be meaningless as it can be redefined by anyone.<sup>172</sup> Secondly, the concept of sustainable development fails to articulate clear objectives and coherent strategies for its implementation. An examination of the latest outcomes of the UN summits – the 2030 Agenda. The 2030 Agenda contains the enormous number of 17 goals and 169 targets.<sup>173</sup> This already appears to be more decorative than functional.<sup>174</sup> Moreover, the 2030 Agenda does not include an overarching goal.<sup>175</sup> Additionally, several goals and the corresponding targets<sup>176</sup> are weak or vague.<sup>177</sup> Some targets even lack the power to enable effective implementation because of their vague formulation.<sup>178</sup> Furthermore, the environmental dimension of the concept of sustainable development is reflected in the 2030 Agenda but not specifically addressed.<sup>179</sup> Thirdly, the concept of sustainable development does not characterize the environment as an entity with its own rights. Sustainable development rather aims to ensure that the development remains within the ecological limits of nature.<sup>180</sup> The concept of sustainable development places environmental protection within a broader discourse of development and environmental protection is only one out of many goals.

In contrast, rights of nature go further than only serving the purpose of sustainable development. Under rights of nature natural entities are preserved regardless of their value for humans. This requires that any development must respect the "rights" of nature.<sup>181</sup> Unlike the concept of sustainable development, the main objective of the existing domestic rights of nature is clearly formulated: rights of nature's purpose is

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<sup>170</sup> Eurostat Sustainable development – broader horizon 3-4; Michel Beyond Aid 1.

<sup>171</sup> Kates et al Environment: Science and Policy for Sustainable Development 20.

<sup>172</sup> Kates et al Environment: Science and Policy for Sustainable Development 20.

<sup>173</sup> 2030 Agenda for Sustainable Development.

<sup>174</sup> Langford 2016 *EIA* 2.

<sup>175</sup> Review of Targets for the Sustainable Development Goals: The Science Perspective 9.

<sup>176</sup> Goal 12 of the 2030 Agenda for Sustainable Development, for example, is supposed to ensure sustainable consumption and production patterns. Even though this is a relevant goal most following targets are neither clear nor quantified.

<sup>177</sup> Langford 2016 *EIA* 8; Review of Targets for the Sustainable Development Goals: The Science Perspective 60.

<sup>178</sup> Review of Targets for the Sustainable Development Goals: The Science Perspective 6.

<sup>179</sup> Goal 7 of the 2030 Agenda, for instance, deals with energy. But renewable energy is either highlighted nor quantified.

<sup>180</sup> Good 2013 *NELR* 37.

<sup>181</sup> Good 2013 *NELR* 37.

the protection of the environment and the humans who live in it. Hence, the rights of nature approach gives environmental protection a much higher priority than the concept of sustainable development does. Moreover, the existing domestic rights of nature provisions are defined more precisely than the concept of sustainable development. As elaborated above, the existing domestic rights of nature all grant nature its own moral and legal claim as well as its own standing. In summary, the nature rights approach is more appropriate for achieving environmental protection.<sup>182</sup>

### 3.1.1.2 Extension of Legal Protection for Environmental Law

Rights of nature also expand the legal armoury of the existing environmental law. First of all, existing domestic rights of nature provisions facilitate the legal protection of the environment since they offer an additional legal basis for protecting the environment. Consequently, a claim must not only be based on the existing legal instruments. At the same time, rights of nature increase the legal position of nature. In most legal systems animals, plants or almost every other part of the planet are legally seen as objects or things and are considered property of a natural or a juristic person.<sup>183</sup> Any owner enjoys extensive powers over his property. For instance, the owner has the right to decide whether or not to kill his animal or to cut his tree.<sup>184</sup> Moreover, often only the owner has the legal competence to claim compensation for any damage of his property. The rights of nature provisions in Ecuador, the US and NZ help to overcome these limits of property law. The TUTOHU WHAKATUPA Agreement of New Zealand is an extreme example for a completely different approach. As a legal entity, the Whanganui river in New Zealand has standing and cannot be owned. The river cannot be owned in any sense that common law property laws provide.<sup>185</sup> Additionally, the river is able to bring any claim against anyone for damages of its wellbeing.<sup>186</sup> The substantive legal position of nature is, therefore, stronger compared to conventional legal approaches.

Rights of nature may also help to overcome the limits of the common law of delict. The common law of delict is especially important for the contemporary pollution control law.<sup>187</sup> It is an environmental compliance and enforcement tool which is generally directed at compensation for patrimonial damage. Pursuant to the law of delict a defendant is liable for damage wrongfully caused by an intentional or

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<sup>182</sup> Good 2013 *NELR* 37.

<sup>183</sup> Cullinan *Wild Law* 55.

<sup>184</sup> Cullinan *Wild Law* 55.

<sup>185</sup> Hsiao 2012 *EPL* 374.

<sup>186</sup> Hsiao 2012 *EPL* 375.

<sup>187</sup> Glazewski & Du Toit *Environmental Law in South Africa* 20.3.

negligent act against a person or property of another.<sup>188</sup> However, it is very difficult to prove all these requirements in environmental cases. A plaintiff often does not have sufficient access to scientific expertise to prove the requirements.<sup>189</sup> The existing domestic rights of nature provisions are much easier to comply with than the common law of delict. For a successful damages claim under common law of delict or environmental law humans or property must have suffered harm or been damaged by an activity which destroys the environment. Rights of nature avoid this problem. They facilitate access to courts because the violation of a right of nature is sufficient for a successful claim.<sup>190</sup> As seen above, the TUTOHU WHAKATUPA Agreement stipulates that the representatives of the Whanganui River can claim compensation against anyone for damages of the river irrespective of whether a person or property was damaged as a result of the damages done to the river.<sup>191</sup> Furthermore, it is significantly less difficult to show that the defendant's action caused harm to the environment than proving that the environmental destruction also lead to the plaintiff's injury.<sup>192</sup> This also reduces the costs of legal proceedings. Fewer experts and less evidence is required to prove damage to nature than to prove that an action caused harm to a human.<sup>193</sup>

Additionally, the concept of rights of nature also shifts the burden of proof. Environmental litigation and the common law of delict regularly face the problem of proving causation. It is often difficult to identify who is responsible for environmental destruction.<sup>194</sup> In Ecuador, the Provincial Court of Loja stated in the Vilcabamba case<sup>195</sup> that for an action protecting rights of nature the defendant bears the burden of proving that the activity in question does not result in the alleged harm. The Court thereby applied Art. 397(1) of Ecuador's Constitution.<sup>196</sup> Art. 397(1) of Ecuador's Constitutions states "[t]o permit any natural person or legal entity, human community or group, to file legal proceedings and resort to judicial and administrative bodies without detriment to their direct interest, to obtain from them effective custody in environmental matters, including the possibility of requesting precautionary measures that would make it possible to end the threat or the environmental damage that is the object of the litigation. The burden of proof regarding the absence of potential or real danger shall lie with the operator of the activity or the defendant". The

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<sup>188</sup> Glazewski & Du Toit *Environmental Law in South Africa* 20.3.

<sup>189</sup> Summers "Common-Law Remedies for Environmental Protection" in Paterson & Kotze *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 356.

<sup>190</sup> Shelton *Nature as a legal person* 11.

<sup>191</sup> Hsiao 2012 *EPL* 375.

<sup>192</sup> May & Daly 2011 *IUCN AELJ* 16.

<sup>193</sup> May & Daly 2011 *IUCN AELJ* 16.

<sup>194</sup> Shelton *Nature as a legal person* 11.

<sup>195</sup> *Wheeler c. Director de la Procuraduria General Del Estado de Loja*, Juicio No. 11121-2011-0010.

<sup>196</sup> Colon-Rios 2015 *NZJPIL* 111-112.

shift of the burden of proof from the plaintiff to the defendant facilitates environmental litigation enormously. It increases the plaintiff's prospects of success and reduces its costs.

Finally, judges can unilaterally apply rights of nature in their decisions. In Ecuador, different courts applied rights of nature even though the lawsuits were originally not concerned with rights of nature. The courts recognized rights of nature as part of the Ecuadorian law and their professional standards required them to apply and interpret the law in its entirety.<sup>197</sup> An example is the Santa Cruz Road case. In 2012, citizens filed a lawsuit for protective action to prevent the construction of a road in Santa Cruz, Ecuador. Their argument was based on the fact that the municipality did not have an environmental license for the project. The court applied rights of nature in its decision even though it was not part of the submission of the parties. The judge stated that the case involved the rights of nature and ruled these must be factored into any solution.<sup>198</sup> Ecuador's legal system shows, hence, that judges can apply rights of nature even when claimants do not base their claims on these. This may also increase the protection of the environment.

### 3.1.2 Promoting a Paradigm Shift

Possibly even more important than the legal benefits of rights of nature is their power to shift paradigms. Rights of nature help shift perceptions and the way humans view the world.<sup>199</sup> In general, the significance of rights is not limited to their legal value. Of a perhaps greater significance is the way in which rights influence the moral and political thinking.<sup>200</sup> A major benefit of the rights approach is that rights can influence political decisions. The implementation of rights of nature increases the weight of nature in environmental considerations. Rights have the ability to trump political decisions.<sup>201</sup> Consequently, they help overcome the lack of political will to protect the environment. Moreover, the recognition that nature has its own inherent rights may influence the perception and behaviour towards nature. It offers space for a discussion about the environment and conservation that was previously inexistent.<sup>202</sup> Important examples of a shift of perceptions are the abolition of slavery and the universal recognition of human rights.<sup>203</sup> The introduction of these rights expended the field of moral concerns. Rights of nature may

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<sup>197</sup> Kauffmann & Martin Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Other Fails 16.

<sup>198</sup> Kauffmann & Martin Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Other Fails 16.

<sup>199</sup> Burdon 2010 *AHR* 86.

<sup>200</sup> Jones *Rights* 3.

<sup>201</sup> Good 2013 *NELR* 37.

<sup>202</sup> Arias Conversation with Natalia Greene about the Rights of Nature in Ecuador.

<sup>203</sup> Burdon 2010 *AHR* 86.

have a similar effect and lead to a cultural change.<sup>204</sup> The idea behind it is that humans abuse nature because they regard nature as their commodity.<sup>205</sup> Only if humans view nature as a community to which they belong will they use nature with respect.<sup>206</sup> A shift of perception induced by codified rights of nature may, therefore, improve environmental protection by changing the mindset of the people.

### 3.2 Constraints Facing Existing Domestic Rights of Nature

Despite their benefits, rights of nature face many practical and theoretical problems. This section identifies the main procedural and substantive constraints facing the implementation of existing domestic rights of nature – again focussing on the constitutional right in Ecuador, rights of nature in ordinances of the US and the TUTOHU WHAKATUPA Agreement of New Zealand. A review of relevant literature identified three main procedural constraints and three major substantive problem areas. In addition to these law related or inherent constraints, on which this dissertation focuses, several non-legal constraints exist. Non-legal or contingent constraints, such as economic, historical and social-political factors, may also hamper the effective implementation and enforcement of rights of nature.<sup>207</sup> Rights of nature only contribute to environmental protection if they are enforced by a supportive institutional and political environment.<sup>208</sup> A lack of government accountability and corruption decreases the efficiency of rights of nature.<sup>209</sup> Political instability as well as an economy which is based on extraction also have negative impacts on the enforcement and implementation of rights of nature.<sup>210</sup>

#### 3.2.1 Procedural Constraints

There appear to be three main procedural constraints facing the successful implementation of existing domestic rights of nature. Firstly, the nature of the institutions with jurisdiction to decide on and enforce rights of nature play an important role. Secondly, standing and representation of rights of nature are important procedural issues. Thirdly, accountability and costs order provisions in litigation relating to rights of nature are key for an effective implementation of rights of nature.

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<sup>204</sup> Burdon 2010 *AHR* 86; Sheehan 2015 *NZJPI* 97.

<sup>205</sup> Burdon 2011 *IUCN AELJ* 5.

<sup>206</sup> Leopold *A Sandy County Almanac* 240.

<sup>207</sup> Rühls & Jones 2016 *Sustainability* 14.

<sup>208</sup> Good 2013 *NELR* 37.

<sup>209</sup> Whittemore 2011 *PRLPJ* 671-674.

<sup>210</sup> Rühls & Jones 2016 *Sustainability* 14.

### 3.2.1.1 Institutions, Enforcement & Capacity

An important procedural issue concerns the identification of courts which decide upon rights of nature and the authorities which enforce rights of nature. The institutional issue is crucial for two main reasons:

Firstly, lack of judicial independence may prevent any productive environmental litigation.<sup>211</sup> Judicial independence involves, at its core, the ability and willingness of courts to decide cases in light of the law without involvement of other government actors.<sup>212</sup> Only if the independence of judges is guaranteed fair judgements can be expected. Where the judiciary is ineffective, new developments in substantive law will make little difference.<sup>213</sup> Different criteria, such as life tenure, limited removal conditions as well as secure and good salaries are essential for the independence of judges.<sup>214</sup> The same applies to the enforcement authorities. Independent public institutions facilitate the implementation and enforcement of rights of nature.

Secondly, judges and administrative officers may struggle applying rights of nature because of a lack of understanding of these.<sup>215</sup> The lack of knowledge regarding rights of nature may lead to incorrect interpretation.<sup>216</sup> Judges' knowledge and the right interpretation is particularly important for the implementation of rights of nature. A look at court decisions in Ecuador proves this assumption. Many lawyers and judges lack knowledge of rights of nature and how to interpret them.<sup>217</sup> The idea that rights of nature can override property rights in certain circumstances is foreign to many judges and at odds with their legal training. Therefore, in some court cases judges in Ecuador have ruled that economic development activities are protected by individual rights that supersede rights of nature.<sup>218</sup> The case of the El Condor-Mirador Mining Project<sup>219</sup> in Ecuador, for instance, illustrates the problem of lack of knowledge. A collection of indigenous peoples' movements as well as environmental and human rights NGO's (Non-Governmental Organization's) filed a case against the Mirador Project and Open Pit Mining arguing that the extraction of gold and copper violates rights of nature.<sup>220</sup> The Condor-Mirador Mining

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<sup>211</sup> Whittemore 2011 *PRLPJ* 671-674.

<sup>212</sup> Melton & Ginsburg Does De Jure Judicial Independence Really Matter? 190.

<sup>213</sup> Dam The Judiciary and Economic Development 2-3.

<sup>214</sup> Melton & Ginsburg Does De Jure Judicial Independence Really Matter? 195-196.

<sup>215</sup> Rühls & Jones 2016 *Sustainability* 13.

<sup>216</sup> Kauffmann & Martin Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Other Fails 9.

<sup>217</sup> Suárez Defending nature: Challenges and obstacles in defending the rights of nature Case Study of the Vilcabamba River 10-12.

<sup>218</sup> Kauffmann & Martin Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Other Fails 9.

<sup>219</sup> Almeida Albuja Nely Alexandra et. al. v. Ecuacorriente S.A. et. al., Acción de Protección Constitucional, Case number 2013-0317, 25th Civil Court of Pichincha.

<sup>220</sup> Rühls & Jones 2016 *Sustainability* 13.

Project is a large-scale mining project in the Condor Highland. The project includes 6 mining concessions in an area of 9,928 hectares.<sup>221</sup> The Civil Court of Pichincha dismissed the case. The court based its decision on two main considerations. Both reflect a dubious interpretation of constitutional rights of nature. Firstly, the judge ruled that since the mining project does not affect a protected area the environmental damage does not violate rights of nature.<sup>222</sup> This is a very restrictive interpretation and implies that only protected areas are subject to rights of nature.<sup>223</sup> Ecuador's Constitution clearly states that "nature" has rights and not only nature in protected areas.<sup>224</sup> Secondly, the court argued that the civil society was protecting private interests (conservation) whereas the mining company was acting on behalf of a public interest (development).<sup>225</sup> The court further stated that public interest takes precedent over private interest. Applied correctly by the courts, Ecuador's constitutional rights of nature should, however, be interpreted independently of social interests and should be of equal value.<sup>226</sup>

In short, the introduction of rights of nature is like any other ballot initiative or constitutional amendment. The role of rights of nature laws will be clarified and defined over time by the courts.<sup>227</sup> A lack of knowledge and understanding of judges and administrative officers may, therefore, weaken the positive impact rights of nature have on environmental protection.

### 3.2.1.2 Standing and Representation

A major procedural constraint of the existing domestic rights of nature is their standing and representation. The fact that nature cannot defend its own interest in a legal system raises the question who should be able to give nature a legal voice. Some authors claim that enforceable rights require a human rights-holder.<sup>228</sup> A concept of a right without a rights-holder is seen as a contradiction in terms.<sup>229</sup> Some commentators even doubt the practical workability of a right held by non-humans.<sup>230</sup> However, the recent legal recognition accorded to rights of nature show a different reality. As elaborated in Part 2 of the dissertation, the existing domestic rights of nature explicitly list different natural entities such as, nature, natural communities, ecosystems and rivers as legal persons and give them standing. The existing

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<sup>221</sup> Global Alliance for the Rights of Nature The case for Rights of Nature in face of the Mirador Open Pit Copper Mining Project.

<sup>222</sup> Kauffmann & Martin Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Other Fails 10.

<sup>223</sup> Rühls & Jones 2016 *Sustainability* 13.

<sup>224</sup> Kauffmann & Martin Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Other Fails 10.

<sup>225</sup> Rühls & Jones 2016 *Sustainability* 13.

<sup>226</sup> Kauffmann & Martin Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Other Fails 10.

<sup>227</sup> Fish 2013 *SURJ* 10.

<sup>228</sup> Bruckerhoff 2008 *TLR* 635.

<sup>229</sup> Bruckerhoff 2008 *TLR* 635.

<sup>230</sup> Good 2013 *NELR* 35.

domestic rights also differ regarding the question who represents these natural entities. Ecuador's Constitution has a wide approach of representation, the ordinances of US municipalities contain a limited approach of representation and the TUTOHU WHAKATUPA Agreement follows the guardianship approach. Each of the approaches has its limitations.

Rights of nature are only of high value if they are actionable in court. One of the biggest problems of the rights of nature in Ecuador's Constitution is the lack of a clear standing doctrine. Ecuador's Constitution is unclear as to who can bring an action for the protection of nature's rights before court.<sup>231</sup> This causes fundamental uncertainty about the justiciability of claims under Art. 71 – Art. 74 of Ecuador's Constitution.<sup>232</sup> It gives reason for doubt whether rights of nature actually have the quality of legal rights.<sup>233</sup> Some authors even interpret the provisions as a list of a national vision rather than a state obligation.<sup>234</sup> The Constitution remains vague with respect to the requirements for persons defending rights of nature.<sup>235</sup> Art. 71 of the Constitution stipulates that "every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms". Despite the fact that the Constitution explicitly grants the rights of nature before the courts to any person, it remains unclear as to which procedural requirements must be met. Without clear standing criteria plaintiffs are not able to effectively sue and rights of nature remain unenforceable.<sup>236</sup> The broad "actio popularis" (open standing) approach of Ecuador's Constitution raises further concerns. Actio popularis approach means that standing is granted to everyone, regardless of whether they suffered direct harm.<sup>237</sup> Permitting anyone to sue on behalf of nature bares several risks. An insufficiently prepared representative, for instance, may litigate a case which creates bad precedent.<sup>238</sup> Actio popularis could also lead to a "race to the court" by different parties.<sup>239</sup> A "race to the court" by different parties wastes resources and does not further rights of nature.

In contrast, the approach of most of the US ordinances seems too narrow. Many ordinances limit the number of representatives to the residents of the city or the borough.<sup>240</sup> This approach limits the effectiveness of rights of nature because they may not be claimed by anybody. Many residents may not

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<sup>231</sup> Rühls & Jones 2016 *Sustainability* 11-12.

<sup>232</sup> Rühls & Jones 2016 *Sustainability* 12.

<sup>233</sup> Whittemore 2011 *PRLPJ* 666.

<sup>234</sup> Fish 2013 *SURJ* 7.

<sup>235</sup> Whittemore 2011 *PRLPJ* 667.

<sup>236</sup> Whittemore 2011 *PRLPJ* 668.

<sup>237</sup> Fish 2013 *SURJ* 7.

<sup>238</sup> Laitos "Rules of law for use and nonuse of nature" in Voigt *Rule of Law for Nature* 220.

<sup>239</sup> Laitos "Rules of law for use and nonuse of nature" in Voigt *Rule of Law for Nature* 220.

<sup>240</sup> For example, 618.03 (b) Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010; 7.6 Ordinance NO. 612, Tamaqua Borough, Schuylkill County, Pennsylvania, 2006.

be interested or do not have the knowledge and financial background to defend nature's rights. As a result, no one may claim rights of nature in the end.

The guardianship approach of the TUTOHU WHAKATUPA Agreement also has disadvantages. Pursuant to the agreement the government is one out of two representatives of the river. This representation may not serve to protect the major value of the environment. Governments' short term interests conflict with long term ecological interests.<sup>241</sup> Governmental authorities normally issue exploration and exploitation permits and generate considerable revenues with those licenses for the state. Moreover, a certain level of degradation may also be justified for most of the human population.<sup>242</sup> Therefore, the government may not always act on behalf of the interests of the natural entity. This critique not only applies to a government. Each guardian may have its own interest which collide with nature's interests.

The question whether natural entities are capable of having interests and whether humans can determine these interests does not only apply to the guardianship approach.<sup>243</sup> Each approach of representation must deal with this problem. As soon as people are able to sue on behalf of nature under a standing doctrine, there is the possibility that claims based on nature's rights will be used to further personal interest.<sup>244</sup> An example is the previously mentioned Vilcabamba River case<sup>245</sup> in Ecuador. The plaintiffs argued on behalf of nature that the construction of a road was polluting the Vilcabamba River. Even though the positive judgement prevented environmental damage, it was primarily a victory for the plaintiffs and their economic interests. Their property would have been flooded by the construction of the road. The plaintiffs had plans to construct tourist facilities on their property. These may have similar impacts on the environment as the construction of the road would have had.<sup>246</sup> Another aspect of the problem is that more powerful groups, such as well-resourced communities and corporations, could use rights of nature to perpetuate their personal objectives. Schools or waste treatment facilities, for instance, are necessary but also create strains for residents. Powerful groups may use rights of nature to relocate such developments to neighbourhoods which have less resources to fight them. Consequently, poor neighbourhoods are probably more affected by developments and the impacts on the environment could be even greater.<sup>247</sup> Therefore, problematically formulated standing doctrines may not only harm the environment but also cause environmental injustice. In short, standing and representation of rights of

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<sup>241</sup> Shelton Nature as a legal person 10.

<sup>242</sup> Shelton Nature as a legal person 11.

<sup>243</sup> Huffman 1992 *PLRLR* 59.

<sup>244</sup> Fish 2013 *SURJ* 7-8.

<sup>245</sup> Wheeler c. Director de la Procuraduria General Del Estado de Loja, Juicio No. 11121-2011-0010.

<sup>246</sup> Fish 2013 *SURJ* 8.

<sup>247</sup> Fish 2013 *SURJ* 8.

nature are difficult to regulate. The approaches in Ecuador's Constitution, ordinances in the US and TUTOHU WHAKATUPA Agreement all have flaws. Hence, a different approach to standing and representation is necessary.

### **3.2.1.3 Accountability and Costs**

Two further important procedural constraints facing existing domestic rights of nature are the accountability and the costs of proceedings.<sup>248</sup>

Firstly, it should be clear who can be held accountable for violations of rights of nature. The most significant environmental damages result from multiple actions which take place simultaneously. Often public as well as private actions are responsible for environmental damage.<sup>249</sup> The existing domestic rights of nature do not contain clear accountability provisions. They do not clearly stipulate whether the state and its organs and/or private entities are to be held liable. Moreover, violations of rights of nature often exhibit transnational dimensions.<sup>250</sup> The existing domestic rights of nature do not lay down any provisions on how to deal with environmental damage in a transnational context.

Secondly, it is imperative to determine the costs for the legal representation and court fees.<sup>251</sup> Proceedings can be extremely expensive. Environmental litigation can be far more costly than the vindication of other rights.<sup>252</sup> Only if the legal costs are affordable and clearly determined prior to the proceedings will plaintiffs bring legal action to protect the environment. At the same time, the legal expenses should not be too low. Otherwise, there are no boundaries to file a claim and rights of nature are used inflationary. This may threaten the capacities of legal systems.

### **3.2.2 Substantive Constraints**

Existing domestic rights of nature also face three main substantive constraints. These constraints especially relate to their scope. Firstly, the scope of existing domestic rights of nature itself raises concerns. Secondly, the definition of an actionable violation of rights of nature is complicated. Thirdly, the

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<sup>248</sup> Whittemore 2011 *PRLPJ* 668.

<sup>249</sup> May & Daly 2011 *IUCN AELJ* 18.

<sup>250</sup> May & Daly 2011 *IUCN AELJ* 18.

<sup>251</sup> Whittemore 2011 *PRLPJ* 668.

<sup>252</sup> May & Daly Constitutional Environmental Rights 8.

relation of rights of nature to other rights and the relation of rights of nature amongst each other is challenging.

### 3.2.2.1 Scope of Rights

The scope of each of the existing domestic rights of nature is defined differently and each of the existing domestic rights of nature provisions faces different challenges regarding their scope.

Ecuador's Constitution has an extensive approach and states that "Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution".<sup>253</sup> Defining rights in such wide terms raises various concerns. First of all, the constitutional provisions of rights of nature in Ecuador's Constitution are textually vague.<sup>254</sup> Some commentators are of the opinion that it is not clear whether the provisions provide a basis for a legal cause of action or if they are intended to be broad statements of policy.<sup>255</sup> One could even argue that rights of nature seek to turn the world back to a wild forests.<sup>256</sup> Moreover, the provisions do not define the entities they seek to protect.<sup>257</sup> The main problem is that the Constitution does not determine the term "nature" or "Pachamama".<sup>258</sup> Both concepts are extremely broad and are likely to confuse courts and litigants.<sup>259</sup> It can be claimed that the use of general language is part of constitutional provisions and allows a broad interpretation and relevance over time.<sup>260</sup> However, the broad interpretation may lead to conflicts. Nature could reasonably include a wide range of entities.<sup>261</sup> From a scientific perspective nature also contains less endearing entities such as pest, viruses, bacteria, tornados and intangible entities like climate.<sup>262</sup> Ecuador's Constitution, read literally, grants all these entities equal rights "to exist, persist, maintain and regenerate"<sup>263</sup> as well as restore themselves.<sup>264</sup> Therefore, by granting broad protection, Ecuador's Constitution creates bizarre conflicts between different entities. A litigant could, for instance, prepare a case on behalf of viruses.<sup>265</sup> Furthermore, the broad term nature leaves its interpretation to

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<sup>253</sup> Art. 71 of Ecuador's Constitution.

<sup>254</sup> Whittemore 2011 *PRLPJ* 669.

<sup>255</sup> Good 2013 *NELR* 35.

<sup>256</sup> Burdon 2010 *AHR* 81-82.

<sup>257</sup> Whittemore 2011 *PRLPJ* 669.

<sup>258</sup> Rühls & Jones 2016 *Sustainability* 11.

<sup>259</sup> Whittemore 2011 *PRLPJ* 669.

<sup>260</sup> Burdon 2010 *AHR* 69.

<sup>261</sup> Fish 2013 *SURJ* 9.

<sup>262</sup> Whittemore 2011 *PRLPJ* 669.

<sup>263</sup> Art. 71 of Ecuador's Constitution.

<sup>264</sup> Whittemore 2011 *PRLPJ* 669.

<sup>265</sup> Whittemore 2011 *PRLPJ* 669.

judges. This poses a difficulty. Judges could adapt an anthropocentric definition of nature and corporations may justify the destruction of nature with the protections of other rights of nature.<sup>266</sup>

The determination of the US ordinances that “natural communities and ecosystems [...] possess [...] rights to exist and flourish”<sup>267</sup> raises similar concerns as the broad scope of rights of nature in Ecuador’s Constitution. Since the ordinances only specify and not limit the terms “natural communities and ecosystems” they also have a broad scope. Therefore, rights of nature provisions in US ordinances may also include entities such as pest and give the opportunity to interpret them in anthropocentric way. However, the ordinances of the US specify their scope by focussing on certain topics. The ordinance of the City of Pittsburgh, for instance, protects particularly “wetlands, streams, rivers, aquifers, and other water systems”.<sup>268</sup> This makes it easier to apply and to enforce the US ordinances than the broader provisions in Ecuador’s Constitution.<sup>269</sup> For instance, a litigant in the City of Pittsburgh can be assured that different kinds of water systems are protected by the ordinance.

For a litigant on behalf of the the Whanganui River it is even more obvious. The TUTOHU WHAKATUPA Agreement clearly stipulates that only the Whanganui River is protected and grants rights only to the river.<sup>270</sup> Since the TUTOHU WHAKATUPA Agreement recognises a particular natural entity as rights holder rights of nature are easily applicable.

Another issue all existing domestic rights of nature face is the question of the extent of protection.<sup>271</sup> Ecuador’s Constitution grants nature “the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution”.<sup>272</sup> The US ordinances state that “natural communities and ecosystems [...] possess [...] rights to exist and flourish”. In contrast, the TUTOHU WHAKATUPA Agreement does not clearly name the rights of the Whanganui River. The TUTOHU WHAKATUPA Agreement only lays down the primary functions of guardians. A primary function of the guardians is, for instance, the protection of the health and wellbeing of the river.<sup>273</sup> But what exactly does it mean that nature has the right to maintain or to exist and what is part of the health and wellbeing of the Whanganui

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<sup>266</sup> Rühls & Jones 2016 *Sustainability* 11.

<sup>267</sup> 618.03 Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010.

<sup>268</sup> For example, 618.03 Ordinance NO. 618.03, City of Pittsburgh, Pennsylvania, 2010.

<sup>269</sup> Good 2013 *NELR* 41.

<sup>270</sup> 2.1 of the TOTOHU WHAKATUPUA Agreement.

<sup>271</sup> Whittemore 2011 *PRLPJ* 669.

<sup>272</sup> Art. 71 of Ecuador’s Constitution.

<sup>273</sup> 2.21 of the TOTOHU WHAKATUPUA Agreement.

River? Since the existing domestic rights of nature do not define the extent of protection judges must interpret and thereby define the provisions.

In short, rights of nature should be defined clearly regarding the entities they protect and regarding the extent of protection. Without a clear definition of their scope and extent of protection rights of nature cannot achieve their purpose of protecting the environment and environmental plaintiffs face difficulties acting on behalf of nature.<sup>274</sup>

### **3.2.2.2 Actionable Violations**

The experiences with the existing domestic rights of nature also show that courts struggle to define a violation of rights of nature.

An expansive interpretation of rights of nature brings considerable juridical challenges. A broad ambit of rights of nature may endanger the capacities of legal systems since almost every governmental and private action could constitute a violation. However, no government and no legal system can survive if every action can be subject to judicial review.<sup>275</sup> On the other hand, the scope of rights of nature must not be too narrow. If the ambit is too narrow rights of nature do not provide sufficient protection for the environment. Furthermore, vindicating environmental rights often leads to fundamental questions of policy choices.<sup>276</sup> This means that courts must balance various interests. For instance, should a court call for the closure of an industrial site to protect the environment even though that results in loss of jobs and poverty for the employees while the environmental damage is low? Or should a court restrict hydraulic fracturing on behalf of the environment even if the exploitation of gas advances the nation's energy independence and the risks of environmental damages are limited?<sup>277</sup> Therefore, it is essential to define the thresholds which constitute an actionable violation of rights of nature.

### **3.2.2.3 Relationship with Other Rights**

Another problem of the existing domestic rights of nature is the relation of the respective right to other rights as well as the relation of rights of nature amongst each other.

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<sup>274</sup> Whittemore 2011 *PRLPJ* 670.

<sup>275</sup> May & Daly 2011 *IUCN AELJ* 15.

<sup>276</sup> May Constitutional Environmental Rights 9.

<sup>277</sup> May Constitutional Environmental Rights 9.

Seeing nature and humans as equivalent entities in law can be problematic.<sup>278</sup> Ecuador's Constitution, the ordinances of the US and the TUTOHU WHAKATUPA Agreement do not provide any guidance as to what happens when rights of nature conflict with human rights. What happens if the human right of property collides with the right of an animal to exist? Or what happens if the Whanganui River is threatening to flood a settlement and this can only be prevented by building a dam? This lack of clarity regarding the hierarchy of rights prevents an effective application of rights of nature.<sup>279</sup>

Additionally, neither Ecuador's Constitution nor the ordinances of the US provide instructions on how to balance different rights of nature against each other. For instance, the concept of nature in Ecuador's Constitution is very broad which leads to bizarre conflicts between different entities. The same applies to natural communities and ecosystems which are protected by US ordinances. There is no way to mediate between competing claims within the concept of nature.<sup>280</sup> For instance, how should judges weigh the loss of wetland habitat with the potential for the restoration of fish habitat in a dam removal project?<sup>281</sup>

### 3.3 Summary of Key Lessons

Rights of nature may further the environmental protection significantly. This assumption is based on two main reasons: Existing domestic rights of nature add important legal aspects and promote a paradigm shift of the way humans morally and politically perceive the environment. The existing domestic rights of nature provisions stipulate a much higher standard of protection than other environmental movements. They give environmental protection a higher priority than the predominant concept of sustainable development does by preserving natural entities regardless of their value for humans. Additionally, they expand the legal armoury by overcoming the limits of present environmental law. The existing domestic rights of nature are easier to apply compared to other environmental laws. They facilitate the protection of natural entities because they overcome the difficulties to prove the requirements of environmental laws such as the common law of delict.

However, many inherent constraints prevent an effective application of the existing domestic rights of nature. There are three main procedural constraints of concern. Firstly, judicial and administrative institutions which are not independent and poorly trained obstruct the implementation and enforcement of rights of nature. Secondly, a lack of a clear and coherent standing doctrine hinders the effectiveness

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<sup>278</sup> Rühls & Jones 2016 *Sustainability* 11.

<sup>279</sup> Whittemore 2011 *PRLPJ* 670.

<sup>280</sup> Fish 2013 *SURJ* 9.

<sup>281</sup> Fish 2013 *SURJ* 9.

of rights of nature and may even promote environmental injustice. Thirdly, accountability and the costs of legal proceedings also strongly influence the efficiency of rights of nature.

Additionally, the existing domestic rights of nature face three major substantive constraints. To begin with, the scope of the existing domestic rights of nature raises concerns. In particular, their scope is not defined clearly regarding the entities they protect and the extent of protection. Without a clear definition of the scope rights of nature cannot achieve their purpose of protecting the environment. Furthermore, the existing domestic rights of nature fail to define thresholds for an actionable violation of rights of nature. Only if thresholds are determined can rights of nature be applied effectively. Finally, the existing domestic rights of nature provisions lack guidance as to how to handle a conflict between rights of nature and human rights and how to balance different rights of nature against each other.

## 4. Towards a Workable Domestic Rights of Nature Provision

As elaborated in Part 3, many inherent constraints prevent an effective application of the existing domestic rights of nature. Therefore, Part 4 elaborates specific proposals for a more workable domestic rights of nature provision. Firstly, section 4.1 shows that rights of nature should be implemented as a constitutional right. Secondly, section 4.2 considers general requirements relevant for a constitutional rights of nature provision. Finally, section 4.3 examines how to overcome the main procedural and substantive constraints of the existing domestic rights of nature. It will be demonstrated that future attempts to codify rights of nature can draw on lessons learnt from the existing codifications. Future rights of nature should adapt their wording and their framing to the success and failures of the existing domestic rights of nature.<sup>282</sup>

### 4.1 Why Entrench Rights of Nature in a Constitution

For the implementation of rights of nature, it is crucial to examine where rights of nature should be embedded in the legal system. As illustrated above, rights of nature are implemented in different ways. Rights of nature exist as a declaration on the international level, as a provision on the constitutional level in Ecuador, on the local level in ordinances of US municipalities and in form of an agreement in NZ. However, other ways of implementation are possible. Rights of nature can also be introduced into the preamble of environmental legislation, in a statement of government policy or through the establishment of a parliamentary committee on nature rights.<sup>283</sup> However, the aim of the following analysis is to show that rights of nature should ideally be embedded as a hard domestic legal instrument, preferably a country's constitution in order to be most effective.

#### 4.1.1 Hard Law vs Soft Law Legal Instruments

As a first step, it is important to determine why rights of nature should be implemented as a hard law legal instrument instead of a soft law legal instrument. One way of advancing rights of nature is through the recognition of rights of nature. This non-binding soft law introduction of rights of nature can be termed the "recognition route".<sup>284</sup> The "recognition route" is based on the idea that there is an acknowledgement but not necessarily any legislation or institutional enforcement of rights of nature.<sup>285</sup>

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<sup>282</sup> Fish 2013 *SURJ* 10.

<sup>283</sup> Good 2013 *NELR* 40-41.

<sup>284</sup> Burdon 2011 *IUCN AELJ* 10.

<sup>285</sup> Burdon 2011 *IUCN AELJ* 10.

The UDRME<sup>286</sup> (Universal Declaration of Rights of Mother Earth) is probably the most important example of the “recognition route”. In 2010, the UDRME was proclaimed at the World’s People’s Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia.<sup>287</sup> Just like the UDHR (Universal Declaration of Human Rights) aims at protecting humans, the UDRME seeks to protect the Earth from excess of humans and human governance systems.<sup>288</sup> The UDRME is not yet recognised in formal international law. It was drafted by private people and organisations. The declaration was, however, formally considered at the April 2011 UN Dialogue on Harmony with Nature.<sup>289</sup> The UDRME contains a preamble and four Articles. The declaration recognizes that Earth is “an indivisible, living community of interrelated and interdependent beings with a common destiny”.<sup>290</sup> It grants “Earth and all beings of which she is composed [...] inherent rights”.<sup>291</sup> Furthermore, the declaration defines fundamental human obligations towards other beings and to the Earth.<sup>292</sup> Even though the UDRME is not legally binding it can have a similar effect as the UDHR. As a non-legal binding document, the Universal Declaration of Human Rights has changed governance systems all around the world.<sup>293</sup> The UDRME gives guidance for rights of nature around the world and can serve as a model for national lawmakers. This may develop further the implementation of rights of nature and may be an important first step to recognize the needs and rights of nature.<sup>294</sup>

The same also applies to the Tribunal (International Tribunal for the Rights of Nature and Mother Earth). The Tribunal sat for the first time in January 2010 in Ecuador. It was created by an international civil network and comprised of lawyers and ethical leaders from indigenous and non-indigenous communities around the world.<sup>295</sup> The Tribunal hears cases regarding alleged violations of rights of nature and recommends appropriate remedies and restoration. Thereby, the main legal source is the UDRME.<sup>296</sup> The Tribunal is an important forum for two main reasons. It draws the attention of an international audience to environmental destruction. It is also important for reclaiming “justice” for state sanctioned violations of rights of nature.<sup>297</sup>

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<sup>286</sup> Universal Declaration of Rights of Mother Earth, 2010.

<sup>287</sup> Cullinan “Governing People as Members of the Earth Community” in Prugh & Renner *State of the World - Governing for Sustainability* 6.

<sup>288</sup> Sheehan “Realizing nature’s rule of law through rights of waterways” in Voigt *Rule of Law for Nature* 227.

<sup>289</sup> Maloney 2015 *GJLHD* 42

<sup>290</sup> Preamble of the UDRME.

<sup>291</sup> Art. 2 of the UDRME.

<sup>292</sup> Art. 3 of the UDRME.

<sup>293</sup> Cullinan *Governing People for Earth – The Challenge of the 21<sup>st</sup> Century* 6.

<sup>294</sup> Sheehan “Realizing nature’s rule of law through rights of waterways” in Voigt *Rule of Law for Nature* 230.

<sup>295</sup> Maloney 2015 *GJLHD* 41.

<sup>296</sup> Maloney 2015 *GJLHD* 41.

<sup>297</sup> Maloney 2015 *GJLHD* 42.

The “recognition route” is valuable for the promotion of rights of nature as the UDRME and the Tribunal will hopefully have a positive effect on people’s thinking. However, the “recognition route” has major disadvantages. Firstly, as elaborated above, the current state of the environment is alarming. It is essential that rights of nature are implemented soon. A look at the UDHR shows that the declaration was very important for the development of human rights around the world. However, the implementation of human rights in national legislation took decades and is in parts still not implemented. The same may apply for rights of nature in the UDRME. The environment cannot wait several decades. Fast changes are necessary. Secondly, the UDRME and the decisions of the Tribunal are not binding. Neither the declaration nor the activities of the Tribunal are enforceable.<sup>298</sup> Therefore, they do not have the impact legally implemented rights of nature do have. Legally implemented rights of nature are binding and enforceable. Thus, whilst the “recognition route” is important for the further development of rights of nature and crucial as a guidance, it can only serve as an additional measure. It cannot substitute implementation of rights of nature as a hard law legal instrument. Hence, a hard law legal instrument is preferable compared to a soft law legal instrument.

#### **4.1.2 International vs Domestic Sphere**

As a second step, it is important to examine whether rights of nature should be implemented on a domestic level rather than on an international level. Domestic implementation of rights of nature would appear to provide many advantages when compared to international implementation. Compliance and enforcement, the lack of a central legislative authority, long procedures, weak environmental obligations and the absence of a hierarchical jurisdiction are major disadvantages of the implementation of rights of nature in the international context - disadvantages which do not similarly appear to exist in the domestic context.

Firstly, poor compliance and weak enforcement tools of international environmental law are a major reason why rights of nature should be implemented on the domestic level. Ensuring compliance by members of the international community with international environmental obligations continues to prove difficult.<sup>299</sup> The international arrangements for compliance with international obligations are not sufficient to overcome political, economic and social reasons for non-compliance.<sup>300</sup> Moreover, international law

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<sup>298</sup> Burdon 2011 *IUCN AELJ* 8-10.

<sup>299</sup> Sands *Principles of International Environmental Law* 135.

<sup>300</sup> Sands *Principles of International Environmental Law* 182.

does not have sufficient enforcement tools. Especially since the extent of sanctions is limited states do not always comply with international law.<sup>301</sup> Only a small number of environmental agreements have established international institutions that can directly impose sanctions or have authorized its members to impose trade sanctions against violating parties.<sup>302</sup> It is mainly in the hands of states to enforce environmental obligations. Unfortunately, states have often been unwilling to bring international claims to enforce environmental rights and obligations.<sup>303</sup>

Secondly, the lack of a central legislative authority in international environmental law hinders effective codification.<sup>304</sup> An international legislature as such does not exist. Much of international environmental law is the product of a legislative process which involves several actors and procedures, such as international organizations and states, conference diplomacy, international courts as well as an interplay of treaties, non-binding declarations and customary law.<sup>305</sup> In general, the international law-making system is far less developed than the national system.<sup>306</sup> It is therefore difficult to react instantly to new environmental challenges. Furthermore, international environmental laws are often the result of substantial compromise and lengthy negotiations as they are built on consensus.<sup>307</sup> Consensus among the international actors is a critical deterrent of international law.<sup>308</sup> Binding international law is only constituted if the international actors, particularly the states, intend to create a legally binding instrument.<sup>309</sup> Since the interests of the actors differ in many aspects not many enforceable environmental law instruments exist in the international context. Much of the international environmental law is soft law and its value is merely of a moral and political nature.<sup>310</sup> Moreover, states are often reluctant to surrender control over their territory, peoples and affairs to external international authorities. Even once states have ratified an international agreement, they regularly add reservations to preserve their right to decline to be bound by particular parts of the agreement. This weakens the effectiveness of international law.<sup>311</sup>

Thirdly, international law does not know an independent judiciary body with powers comparable to these of domestic jurisdictions. Even though the role of independent and international jurisdictions is growing,

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<sup>301</sup> Guzman 2002 *CLR* 1886.

<sup>302</sup> Global Change Instruction Program What is International Environmental Law? 4.

<sup>303</sup> Sands *Principles of International Environmental Law* 182.

<sup>304</sup> Sands *Principles of International Environmental Law* 133

<sup>305</sup> Birnie et al *International Law & the Environment* 12-13.

<sup>306</sup> Hunter et al *International Environmental Law and Policy* 271.

<sup>307</sup> Rühls & Jones 2016 *Sustainability* 1-2.

<sup>308</sup> Hunter et al *International Environmental Law and Policy* 355.

<sup>309</sup> Oliver 2002 *SAJELP* 162.

<sup>310</sup> Oliver 2002 *SAJELP* 162.

<sup>311</sup> Global Change Instruction Program What is International Environmental Law? 4.

scope and content of international environmental disputes are of the choice of the states.<sup>312</sup> Additionally, even when international courts have jurisdiction over an international dispute, they heavily rely on the cooperation of states to enforce their decisions.<sup>313</sup>

In contrast to international law, domestic law is, at least in most of the countries that follow the rule of law, made by a parliament or legislative body. The law of the central legislative authority binds even those who disagree with it.<sup>314</sup> The law is implemented and administered by the executive. Finally, the law is interpreted and enforced by an independent judiciary with mandatory jurisdiction and the power to enforce its judgements.<sup>315</sup> A domestic implementation of rights of nature is therefore more effective and thus favourable compared to an international implementation.

#### 4.1.3 Constitution vs other Legal Instruments

Finally, on the domestic level the implementation of rights of nature as a constitutional right is the most effective way compared to other ways of implementation, for example (simple) statutory law or as ordinances on a local level. Admittedly, specific agreements, such as the TUTOHU WHAKATUPA Agreement in NZ, and statutory law, such as ordinances in the US, have several advantages. Specified rights which recognise particular natural entities may, for instance, be easier to apply and to enforce than a broad constitutional right.<sup>316</sup> However, rights of nature as constitutional provisions are the most suitable tool to render codified rights of nature effective. This assumption bases on the following:

Rights of nature as a constitutional provision have a number of legal, social and political advantages other forms of implementation cannot provide. First of all, the adoption of a constitutional approach entrenches a recognition of the importance of environmental protection.<sup>317</sup> Legal systems generally establish a hierarchy of norms. Constitutional provisions are usually on the highest hierarchy level.<sup>318</sup> Constitutional law normally establishes the ground rules of government, is the supreme law of the land, entrenched to reflect and preserve its primacy, and is enforced through the power of judicial review.<sup>319</sup> Therefore, rights of nature being part of a constitution provide the opportunity and the means by which to

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<sup>312</sup> Sands *Principles of International Environmental Law* 182.

<sup>313</sup> Global Change Instruction Program What is International Environmental Law? 3.

<sup>314</sup> Hunter et al *International Environmental Law and Policy* 270.

<sup>315</sup> Hunter et al *International Environmental Law and Policy* 270.

<sup>316</sup> Good 2013 *NELR* 41.

<sup>317</sup> Hayward Constitutional Environmental Rights 7.

<sup>318</sup> Shelton Nature as a legal person 2.

<sup>319</sup> Gardbaum "The Place of Constitutional Law in the Legal System" in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* 169-170.

reform environmental governance and laws.<sup>320</sup> Environmental care is prioritized by equating it at the higher constitutional level to other fundamental rights. A constitutional codification also creates a legitimate foundation to create and enforce rights of nature.<sup>321</sup>

Secondly, rights of nature as constitutional provisions offer the possibility of unifying principles for legislation and regulation.<sup>322</sup> A constitution normally sets the basic requirements for state organization.<sup>323</sup> By establishing rights of nature in the constitution they can influence legislation and regulation. Thirdly, constitutional provisions normally are the hierarchically superior form of law. They take precedence in case of conflict with other norms.<sup>324</sup> In other words, rights of nature as constitutional provisions “trump” conflicting norms of lower order.<sup>325</sup> Fourthly, constitutionally embodied rights of nature are more durable than non-entrenched rights.<sup>326</sup> In general, constitutional status for rights of nature provides a more stable framework for governance. Reason for this is the fact that constitutional provisions are much harder to amend. This helps to ensure that rights of nature cannot easily be eroded and that they are not the playground of the vicissitudes of day-to-day politics.<sup>327</sup>

Furthermore, probably due to constitutionalism’s normative superiority, the public is more likely to respond to a constitutional provision than to simple statutes. Since constitutionalism bespeaks of shared values the likelihood of compliance increases.<sup>328</sup> Environmental constitutionalism is also a broad concept. It encompasses constitutional law, human rights, environmental law and international law.<sup>329</sup> Those rights and procedural rights such as rights of access to information and just administrative action are necessary for environmental protection. Awarding constitutional protection to rights of nature can lead to a more holistic and coalescent approach to environmental protection.<sup>330</sup> It may complement already existing rights. Finally, many countries’ legislations do not include a broad individual right to a healthy environment.<sup>331</sup> The implementation of rights of nature in those constitutions can therefore significantly improve the legal environmental protection.

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<sup>320</sup> Kotze “Sustainable development and the rule of law for nature: a constitutional reading” in Voigt *Rule of Law for Nature* 144.

<sup>321</sup> Kotze “Sustainable development and the rule of law for nature: a constitutional reading” in Voigt *Rule of Law for Nature* 144.

<sup>322</sup> Hayward *Constitutional Environmental Rights* 7.

<sup>323</sup> Bradley & Ewing *Constitutional and Administrative Law* 4.

<sup>324</sup> Rühls & Jones 2016 *Sustainability* 9.

<sup>325</sup> Shelton *Nature as a legal person* 2.

<sup>326</sup> May & Daly *Constitutional Environmental Rights* 5.

<sup>327</sup> Good 2013 *NELR* 39.

<sup>328</sup> May & Daly *Constitutional Environmental Rights* 5.

<sup>329</sup> Rühls & Jones 2016 *Sustainability* 8.

<sup>330</sup> Rühls & Jones 2016 *Sustainability* 8.

<sup>331</sup> May & Daly *Constitutional Environmental Rights* 5.

#### 4.1.4 Summary of Key Lessons

Rights of nature can be most effectively implemented as a constitutional rights clause. A legal implementation as a hard law instrument is more practical than the implementation as a soft law instrument. A soft law instrument is based on the idea that rights of nature can be promoted through their acknowledgement. However, this method takes time and involves non-binding and non-enforceable declarations. Domestic implementation also has substantive advantages over an implementation on the international level. Compared to international law, domestic law is processed by a central legislative authority, it is implemented and administered by the executive as well as interpreted and enforced by an independent judiciary with mandatory jurisdiction. Additionally, the implementation of rights of nature as a constitutional rights norm has several advantages when compared to other ways of implementation. It sets, inter alia, the foundation to create and enforce legally binding rights of nature on a national level, trumps rights of lower legal order and is more durable.

#### 4.2 General Considerations Relevant to Constitutional Rights

Rights of nature as a constitutional right should also comply with several general requirements in order to be effective. Since 1945 multiple waves of constitutionalization took place around the world which have incorporated bills of rights into constitutional law as standard feature.<sup>332</sup> These rights usually have the characteristics of supremacy, entrenchment and judicial enforceability.<sup>333</sup> However, constitutions around the world differ in various aspects. There is a wide variability in constitutional structure and traditions, judicial systems, acceptance of judicial outcomes, cultural customs as well as the timing of enactment. Each of these factors influences judicial outcomes. Due to the wide variability, it is not predictable how rights of nature as constitutional rights are judicially receptive.<sup>334</sup> In order to be as effective as possible rights of nature as a constitutional provision should, however, comply with certain requirements.

Firstly, constitutional provisions can take various forms. These forms are not necessarily substantive or self-executing.<sup>335</sup> However, in order to be effective a constitutional rights of nature provision should be

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<sup>332</sup> Gardbaum "The Place of Constitutional Law in the Legal System" in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* 176.

<sup>333</sup> Gardbaum "The Place of Constitutional Law in the Legal System" in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* 176.

<sup>334</sup> May & Daly *Constitutional Environmental Rights* 7.

<sup>335</sup> Cho & Pedersen "Environmental rights and future generations" in Tushnet et al *Routledge Handbook of Constitutional Law* 403.

substantive and self-executing.<sup>336</sup> A constitutional right is self-executing if it does not require a separate legislative act in order to become effective.<sup>337</sup> If provisions are not self-executing, the state and private entities are not required to take any particular actions.<sup>338</sup> Therefore, rights of nature must be implemented as a legal rule and not only as a principle. Unlike a rule, principles are broad requirements. Principles require that something must be realized to the greatest extent possible. They are optimization requirements and can be satisfied to varying degrees.<sup>339</sup> In contrast, rules contain fixed requirements which must be fulfilled.<sup>340</sup> Rules are norms that require something definitively. They are definitive commands which must be complied with.<sup>341</sup> An implementation of rights of nature as a self-executing legal rule hence offers a broader protection of natural entities than a constitutional principle can.

Secondly, most constitutional rights are designed to benefit people.<sup>342</sup> In contrast, rights of nature's main purpose is to protect the environment as a whole. A rights of nature norm in a constitution must therefore aim at protecting the environment. The most effective way of protecting the environment is to implement rights of nature as a mix of positive and negative claim-rights: The right to non-interference and the right to receive compensation as well as to be protected and restored. This combination ensures a wide protection of the environment. As seen in Part 2, the existing domestic rights of nature provisions combine positive and negative claims. This combination extends the scope of protection significantly in comparison to rights which are only positive or negative claim-rights.<sup>343</sup>

Thirdly, future codifications of rights of nature should create a positive duty for the state to secure environmental quality. A constitutional rights of nature provision should force the organs of the state to secure rights of nature. Only a positive obligation of the state ensures a further implementation of rights of nature. A positive obligation of the state also develops further a constitutional norm to a more substantive provision.<sup>344</sup> A rights of nature norm in a constitution should therefore state that: "The state

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<sup>336</sup> May & Daly Constitutional Environmental Rights 8.

<sup>337</sup> The American Heritage Dictionary of the English Language.

<sup>338</sup> Cho & Pedersen "Environmental rights and future generations" in Tushnet et al *Routledge Handbook of Constitutional Law* 403.

<sup>339</sup> Alexy "Rights and Liberties as Concepts" in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* 289.

<sup>340</sup> Alexy *A Theory of Constitutional Rights* 47-48.

<sup>341</sup> Alexy "Rights and Liberties as Concepts" in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* 289.

<sup>342</sup> May & Daly 2011 *IUCN AELJ* 15-16.

<sup>343</sup> Gardbaum "The Place of Constitutional Law in the Legal System" in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* 181-183.

<sup>344</sup> Cho & Pedersen "Environmental rights and future generations" in Tushnet et al *Routledge Handbook of Constitutional Law* 403.

has the duty to protect nature, for the benefit of present and future generations, through reasonable legislative and other measures".<sup>345</sup>

### **4.3 Overcoming Procedural and Substantive Constraints**

As elaborated in Part 3, several procedural and substantive constraints prevent an effective application of the existing domestic rights of nature. Section 4.3.1 thus considers ways to overcome the procedural constraints of existing domestic rights of nature while section 4.3.2 considers ways to overcome the substantive constraints of existing domestic rights of nature. Each paragraph concludes with a possible wording for a constitutional rights of nature norm to overcome the constraint in question. The complete draft formulation of a constitutional rights of nature clause is included as Annex 2.

#### **4.3.1 Overcoming Procedural Constraints**

The main procedural constraints concern the institutions which decide on and enforce rights of nature, standing and representation as well as the accountability and costs of proceedings. This section proposes different solutions on how to deal with these procedural constraints.

##### **4.3.1.1 Jurisdiction, Enforcement & Institutions**

The lack of knowledge and understanding of rights of nature as well as the absence of independent institutions hamper the implementation and enforcement of rights of nature. In particular, the judiciary plays an important role in understanding rights of nature.

Therefore, education and empowerment of judges and administrative officers is essential. Only sufficient training promotes understanding of rights of nature and a paradigm shift to a more ecocentric perspective.<sup>346</sup> Moreover, to improve the judiciary and increase judicial independence, judges must enjoy special protection. One possibility is granting judges lifetime tenure.<sup>347</sup> Judges would be protected from executive and legislative impeachment. Lifetime tenure is desirable for judges because it gives them economic security and frees them from undesirable pressures, whether from government, politicians or

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<sup>345</sup> See for the wording section 24 of the Constitution of the Republic of South Africa, 1996.

<sup>346</sup> Rühls & Jones 2016 *Sustainability* 13.

<sup>347</sup> Whittemore 2011 *PRLPJ* 682.

private parties.<sup>348</sup> The need for stability and for lifetime tenure is particularly strong in developing countries with historically weak judiciaries.<sup>349</sup> Other factors to strengthen the position of judges are independent selection procedures, limited removal procedures and limited removal conditions as well as salary insulations.<sup>350</sup>

A further option is the implementation of an independent tribunal for rights of nature and special authorities to enforce rights of nature. The establishment of both institutions has several advantages. An independent enforcement body can provide a special expertise of environmental law and rights of nature. An independent body, separate from the government, should also be more objective. Knowledge and objectivity will increase the effectiveness of rights of nature.<sup>351</sup> An effective enforcement body also gains the public's trust in the government and encourages plaintiffs to bring claims.<sup>352</sup> Furthermore, a specialized environmental court, staffed with environmental and scientific expertise, promotes fair and effective trials. Due to this expertise the courts increase their social legitimacy and are able to issue broader and more creative orders to remedy environmental violations.<sup>353</sup> Such a tribunal also reduces the pressure on other branches of government by deciding politically-charged cases.<sup>354</sup>

A possible wording for the establishment of the necessary institutions could be: "The state must establish an independent tribunal for rights of nature which has exclusive jurisdiction. The judges of the independent tribunal for rights of nature are granted lifetime tenure. The state must establish special authorities to enforce rights of nature."

#### **4.3.1.2 Standing and Representation**

As elaborated above, different ways of granting standing and representation exist. The existing domestic rights of nature differ regarding the question who represents natural entities legally. Each approach of the existing domestic rights of nature has its limitations. The most suitable and practical approach to overcome the limitations is a mixture of the examined approaches. A limited action popularis approach is the most beneficial.

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<sup>348</sup> Dam *The Judiciary and Economic Development* 23.

<sup>349</sup> Whittemore 2011 *PRLPJ* 683.

<sup>350</sup> Melton & Ginsburg *Does De Jure Judicial Independence Really Matter?* 196.

<sup>351</sup> Whittemore 2011 *PRLPJ* 689.

<sup>352</sup> Whittemore 2011 *PRLPJ* 689.

<sup>353</sup> May & Daly 2009 *ORIL* 437.

<sup>354</sup> Whittemore 2011 *PRLPJ* 690.

First of all, it should be clear that rights of nature only apply in the human interaction with nature and can only place duties on human beings. Nature does not hold duties.<sup>355</sup> Nature is not capable, as least as far as we know, to think and act on behalf of duties or laws. It is important, therefore, that standing and the representation is defined clearly. Only a clear standing doctrine ensures that plaintiffs claim rights of nature before court.<sup>356</sup>

Moreover, rights of nature can potentially undermine community and environmental interests. It is therefore essential that the representation of nature is limited. Nature's rights may otherwise be abused to pursue economical and other privileged interests.<sup>357</sup> The representation of rights of nature should also not be too narrow. Only if enough potential plaintiffs have the knowledge and financial background to defend the rights of natural entities rights of nature will be effective. A limited *actio popularis* approach may overcome the constrains of a very broad or very narrow standing approach. The limited *actio popularis* approach means that standing is granted to everyone who acts in the best interest of natural entities. This approach will guarantee enough potential plaintiffs as well as action in the best interest of nature.<sup>358</sup> The legal provisions should ensure that plaintiffs truly act in nature's best interests by making action in the best interest of nature a prerequisite for legitimate representation of nature. Best interest can be defined as to the best of human capabilities.<sup>359</sup> Guidelines for the definition are that the plaintiff must have knowledge of the injured community or ecosystem, a genuine interest to protect and is able to accurately represent nature in litigation.<sup>360</sup>

The limited action popularis approach should be codified as follows: "Any person can bring an action to defend rights of nature, as long as that person (1) can sufficiently show an actual or imminent injury in the natural object, and (2) demonstrate that the potential litigant also has a sufficient interest in the outcome".<sup>361</sup> "A sufficient interest means the best interest of nature." By using this approach representation can be limited to natural persons or environmental organisations who have the knowledge and resources to litigate.<sup>362</sup> This ensures that plaintiffs act on behalf of nature and creates clear standing doctrine.

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<sup>355</sup> Burdon 2010 *AHR* 78.

<sup>356</sup> Rühls & Jones 2016 *Sustainability* 12.

<sup>357</sup> Fish 2013 *SURJ* 10.

<sup>358</sup> Laitos "Rules of law for use and nonuse of nature" in Voigt *Rule of Law for Nature* 220.

<sup>359</sup> Fish 2013 *SURJ* 10.

<sup>360</sup> Fish 2013 *SURJ* 10.

<sup>361</sup> Rühls & Jones 2016 *Sustainability* 12.

<sup>362</sup> Rühls & Jones 2016 *Sustainability* 12.

Additionally, rights of nature can be strengthened by using a concept of precautionary standing. The concept bases on the “precautionary principle”.<sup>363</sup> The precautionary principle applies if there is a threat of significant reduction or loss of nature and full scientific certainty is missing. It can be used as a reason for initiating measures to avoid or minimize such a threat.<sup>364</sup> Courts could apply the principle if plaintiffs cannot prove that tangible harm to the environment has already taken place.<sup>365</sup> Plaintiffs could, then, sue before harm occurs if the constitution grants a concept of precautionary standing.<sup>366</sup>

#### **4.3.1.3 Accountability and Costs**

Finally, it is also important that the accountability is defined clearly and that the costs of legal proceedings are neither unaffordable nor very low.

In order to ensure a broad scope of protection, codifications of rights of nature in a constitution should include a wide concept of accountability. Private and public entities should be held liable for a violation of rights of nature. Rights of nature as a constitutional right must thus apply vertically and horizontally. Traditionally, constitutional rights apply only in the public sphere and not in the private sphere i.e. vertically.<sup>367</sup> In other words, the legislature, the executive, the judiciary and all organs of the state are directly bound but private actors are not directly addressed by constitutional rights. However, it is important that rights of nature are also horizontally applicable. As a consequence, natural and juristic persons are also bound by a constitutional rights of nature norm.<sup>368</sup> This guarantees that not only the state but also private entities are bound by rights of nature and can be held accountable for violations of such rights. This is essential because a constitutional rights of nature provision can be violated by both private and governmental actors.<sup>369</sup> The provision implementing rights of nature should therefore have vertical and horizontal effect.

Furthermore, a rights of nature norm should specify affordable costs for legal representation and court fees. However, a constitution cannot regulate every detail. The purpose of a constitution is to lay down the framework and principal functions of the organs of government within the state and to declare the

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<sup>363</sup> Whittemore 2011 *PRLPJ* 687.

<sup>364</sup> Bruckerhoff 2008 *TLR* 643.

<sup>365</sup> Whittemore 2011 *PRLPJ* 687.

<sup>366</sup> Whittemore 2011 *PRLPJ* 687.

<sup>367</sup> Chirwa 2006 *LDD* 21.

<sup>368</sup> Gardbaum “The Place of Constitutional Law in the Legal System” in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* 177.

<sup>369</sup> Gardbaum “The Place of Constitutional Law in the Legal System” in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* 178.

principles by which those organs operate.<sup>370</sup> Details such as costs should thus be regulated in a separate act. However, a constitution can determine the implementation and the framework for a fee regulation act. Additionally, in order to facilitate access to jurisdiction a legal aid provision should be established. Legal aid ensures that people, who are otherwise unable, can afford legal representation and access to the court system.<sup>371</sup> At the same time, not every case should be supported by legal aid. Only cases with reasonable prospects of success should be granted legal aid. Therefore, a legal aid provision is necessary which supports people who are economically unable to file a lawsuit and also promotes rights of nature. Finally, as seen above, violations of rights of nature also often exhibit transnational dimensions. Therefore, a constitution should take the international dimensions of environmental damage into account. An option to deal with the problem is to enshrine a duty to cooperate internationally in the constitution.

Concluding, a rights of nature norm in a constitution should contain the following wording: “Rights of nature apply to all law, and bind the legislature, the executive, the judiciary and all organs of state. Rights of nature bind natural and juristic persons. The costs for the court and legal representation of rights of nature are regulated by a specific act which must guarantee affordable costs. The state has the duty to implement the act and to cooperate internationally to promote rights of nature.”

“Any parties who, due to their personal and economic circumstances, are unable to bear the costs of litigation of rights of nature, or are able to bear them only in part or only as instalments, will be granted assistance. The granting of legal aid by the court requires that the applicant proves that the claimant is (1) economically not able to bear the costs of the procedures, and (2) that his lawsuit has reasonable prospects of success, and (3) that the cause of action is not frivolous”.<sup>372</sup>

#### **4.3.2 Overcoming Substantive Constraints**

Beside the procedural constraints, several substantive constraints hinder the effective application of rights of nature. The main substantive constraints concern the scope of rights of nature, the definition of an actionable violation of rights of nature as well as the relation of rights of nature to other rights and the relation of rights of nature amongst each other. This section proposes solutions on how to deal with these constraints.

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<sup>370</sup> Bradley & Ewing *Constitutional and Administrative Law* 4.

<sup>371</sup> Houseman 2010 *JLASC* 265.

<sup>372</sup> See for the wording section 114(1) of the German Code of Civil Procedure, 1887.

#### 4.3.2.1 Scope of Rights

In order to be effective rights of nature should have a broad scope regarding the entities they protect and the extent of protection. A wide scope is necessary to ensure a broad protection of nature and the environment. As elaborated above, the scope of the existing domestic rights of nature is defined differently. To guarantee a broad scope future codifications should draw their wording from Ecuador's Constitution and include the widest possible term: "nature". However, the term "nature" should be defined as precisely as possible. Reason for this is the fact that courts must develop or interpret concepts and vocabulary of new constitutional terms which are often vague and amorphous.<sup>373</sup> The main problems with constitutional environmental rights relate to their vagueness and lack of statutory guidance.<sup>374</sup> If nature is not defined precisely enough judges could adapt an anthropocentric definition of nature and rights of nature would not be able to serve their purpose of protecting the environment.

However, it is difficult to define nature precisely. First of all, it is important that the term nature is widely applicable. Only if nature in a general sense is encompassed a broad protection can be achieved. The term nature should include a wide range of components. An effective option of interpreting the term is the ecological holism approach. The ecological holism concept assumes that all components of a natural system, living or non-living, are important. It also presumes that the relevant natural entity is the interrelationship that emerges between nature's parts when humans do not interfere.<sup>375</sup> The concept of ecological holism captures the entire network of interrelations that exist between entities in the nature. This includes living entities, such as animals, as well as non-living entities, such as the atmosphere and the waters of the oceans.<sup>376</sup>

A broad interpretation of nature, however, also faces challenges. As elaborated above, a broad interpretation may lead to conflicts and confusion. Nature can theoretically include almost everything and may confuse courts and litigants. Therefore, it is essential to limit the scope of rights of nature. The limitation of the scope should be done in two steps. Firstly, the content should be limited to a core. Secondly, each natural entity should have its own core rights. Therefore, a process is necessary which defines these core rights for each natural entity in detail. A constitution should initiate this process.

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<sup>373</sup> Goldsworthy "Constitutional Interpretation" in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* 689.

<sup>374</sup> Cho & Pedersen "Environmental rights and future generations" in Tushnet et al *Routledge Handbook of Constitutional Law* 410.

<sup>375</sup> Laitos "Rules of law for use and nonuse of nature" in Voigt *Rule of Law for Nature* 216.

<sup>376</sup> Laitos "Rules of law for use and nonuse of nature" in Voigt *Rule of Law for Nature* 217.

A practical way of limiting the content of rights of nature is looking at the implemented rights of nature or the principles of Earth Jurisprudence. According to the principles of Earth Jurisprudence “[t]he Earth community and all the beings that constitute it have fundamental “rights,” including the right to exist, to have a habitat or a place to be, and to participate in the evolution of the community”.<sup>377</sup> This approach is similar to the concept of a “minimum core content”. This concept involves the identification of the core elements of a right which must be respected.<sup>378</sup> By limiting the scope of rights of nature to the right to exist, to have a habitat or a place to be and to participate in the evolution more clarity can be achieved.

In a second step, rights of nature should be defined more precisely for each entity. Without subsequent attempts to clarify, the rights of nature content is open to various court interpretations.<sup>379</sup> Therefore, each entity should have its specific rights. Berry explained: “Rivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights. Difference in rights is qualitative, not quantitative. The right of an insect would be of no value to a tree or fish”.<sup>380</sup> The UDRME further states that “just as human beings have human rights, all other beings also have rights which are specific to their species or kind and appropriate for their role and function within the communities within which they exist”.<sup>381</sup> In other words, each element of nature should have subject-specific rights to fulfil its roles and evolutionary process.<sup>382</sup> For instance, waterways have waterway rights. This includes the right to flow with water in an amount and quality necessary for the waterway and its dependent ecosystems and species to exist, thrive and evolve.<sup>383</sup> If rights of nature are specified for different entities it will be much easier for courts and litigants to apply them. A constitution cannot, however, specify the core rights of each entity. A constitution can only promote the process and set the framework for a specification. The constitution can determine the process and order the legislative to further legislation protecting each rights-bearing entity. The exact scope of each right of nature will have to be negotiated in a political process.<sup>384</sup> This could have benefits as a political process can include public participation. Public participation may develop further the value of rights nature because it raises awareness.

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<sup>377</sup> Cullinan “Earth Jurisprudence: From Colonization to Participation” in Starke & Mastny *State of the World – Transforming Cultures – From Consumerism to Sustainability* 144.

<sup>378</sup> Good 2013 *NELR* 36.

<sup>379</sup> Cho & Pedersen “Environmental rights and future generations” in Tushnet et al *Routledge Handbook of Constitutional Law* 404.

<sup>380</sup> Berry *Evening Thoughts: Reflecting on Earth as Sacred Community* 149-150.

<sup>381</sup> Art. 1(6) of the UDRME.

<sup>382</sup> Sheehan “Realizing nature’s rule of law through rights of waterways” in Voigt *Rule of Law for Nature* 229.

<sup>383</sup> Sheehan “Realizing nature’s rule of law through rights of waterways” in Voigt *Rule of Law for Nature* 229.

<sup>384</sup> Good 2013 *NELR* 36.

To conclude, a constitution should define nature in a broad way in order to protect it effectively. However, in order to be practical, the content of rights of nature should also be limited. Moreover, the constitution must initiate a process to specify the rights of each rights-bearing entity.

Taking this into account a wording for rights of nature could be the following: “Nature has fundamental rights, including the right to exist, to have a habitat or a place to be, and to participate in the evolution of the community. Nature has the right to be restored. Nature contains all components of the natural system, including living and non-living entities. Each entity has its specific rights. The state has the duty to implement further legislation protecting each rights-bearing entity.”

#### **4.3.2.2 Actionable Violations**

A related important issue is the expansive application of rights of nature. As seen above, a broad scope of rights of nature may endanger the capacities of legal systems. In order to further limit an expansive interpretation this paragraph determines thresholds which could serve as indicators for a violation of rights of nature.

A practical way to simultaneously limit the scope of rights of nature and promote a broad protection is to implement a minimum threshold in the legislation. This may avoid that every restriction of rights of nature is considered a violation of the right. A violation of rights of nature should only be assumed if a specific threshold is crossed. Science should play a key role in the development of these thresholds. Scientific criteria are, in general, important for environmental norms and rules.<sup>385</sup> Accurately scientific criteria help to impose legal obligations corresponding to a constitutional rights of nature provision.<sup>386</sup> Therefore, the application of scientific criteria can serve to develop thresholds. However, as already seen above, a constitution cannot set specific thresholds. It can only set the framework for the development of thresholds. Therefore, a constitutional rights of nature norm should obligate the state to develop and adjust binding scientific guidelines for specific thresholds. The guidelines should lay down when the threshold defining a violation of the right of nature to exist, to have a habitat or a place to be, and to participate in the evolution of the community is crossed. Moreover, guidelines for each entity must be developed. Since each entity, such as birds, rivers or insects, should have its specific right each right needs its specific threshold. However, the constitutional norm must also ensure that the guidelines do not

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<sup>385</sup> Glazewski & Du Toit *Environmental Law in South Africa* 1.5.

<sup>386</sup> Cho & Pedersen “Environmental rights and future generations” in Tushnet et al *Routledge Handbook of Constitutional Law* 405.

undermine the purpose of the rights of nature by setting the threshold to high. Finally, the constitution should set timelines for the development and implementation of the guidelines in order to accelerate proceedings.

A possible wording for the implementation of thresholds could be: “Not every restriction of a right of nature is a violation of the right. Only if a minimum threshold is crossed a violation of rights of nature is given. The state has the duty to develop and adjust regularly binding scientific guidelines for specific thresholds for each entity. The state must implement the guidelines two years after this norm becomes effective. The guidelines have to be developed to ensure the protection of the environment.”

#### **4.3.2.3 Relationship with Other Rights**

The existing domestic rights of nature also ignore the potential for conflicting interests between different rights.<sup>387</sup> As seen above, it is essential that the relation of the rights to other constitutional rights as well as the relation of rights of nature amongst each other is clearly defined. This paragraph examines a preferable hierarchy of rights of nature.

In general, rights of nature should not be implemented as “absolute rights”.<sup>388</sup> An absolute right is one that is never justifiably infringed. Absolute rights must be respected in all possible circumstances.<sup>389</sup> Rights of nature as absolute rights are probably politically unacceptable. It is hard to imagine that the legislative organs in different countries will vote for an absolute right. Additionally, rights are rarely recognized as absolute by courts around the world.<sup>390</sup> Moreover, the implementation of rights of nature as absolute rights would be contradictive to their theoretical background. Rights of nature promote that nature and humans are seen as equally important. This bases on the idea that all things are interconnected and that humans do not stand above of the system earth but are part of it.<sup>391</sup> Consequently, this means that nature is just as important as humans. Rights of nature should, therefore, rather be established as “prima facie” rights. These rights can be justifiably overridden in certain circumstances. In other words, rights of nature may have to yield to competing and more weighty considerations in certain circumstances.<sup>392</sup>

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<sup>387</sup> Fish 2013 *SURJ* 10.

<sup>388</sup> May & Daly 2011 *IUCN AELJ* 21.

<sup>389</sup> Jones *Rights* 190.

<sup>390</sup> Rose-Ackerman et al *Due Process of Lawmaking* 21.

<sup>391</sup> Cullinan “Governing People as Members of the Earth Community” in Prugh & Renner *State of the World - Governing for Sustainability* 3.

<sup>392</sup> Jones *Rights* 195.

However, in order to be effective, rights of nature must possess sufficient legal clout to override purely utilitarian considerations of other rights.<sup>393</sup> A way to achieve a balance between different rights is to focus on relationships rather than individual rights. To resolve a dispute between conflicting rights the solution should focus on relationships. As a consequence, social and environmental contexts become relevant which may lead to better outcomes.<sup>394</sup> A practical option to regulate the relation of rights of nature and other rights is through the guidance of the UDRME.<sup>395</sup> The UDRME stipulates that “the rights of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the integrity, balance and health of Mother Earth”<sup>396</sup>. In other words, each right is limited by other rights and can be trumped only for specific reasons. The formulation is general and includes human and non-human rights. It guarantees the protection of the environment and offers a mechanism to further limit the wide scope of the term nature. Rights of entities, such as pest, viruses, bacteria and tornados, can be trumped by other rights, such as the rights of a mountain or human rights.

A further means to find an adequate balance between rights of nature and other constitutional rights as well as between the individual rights of nature can be taken from the “principle of practical concordance”<sup>397</sup> and the “principle of proportionality”<sup>398</sup>. The principle of practical concordance can be helpful for courts to balance different constitutional rights. The principle is used to solve conflicting rules.<sup>399</sup> It stipulates, in case of conflict, that constitutionally protected legal values must be harmonized with one another in such a way that each right is restricted as little as possible.<sup>400</sup> Part of the principle of practical concordance is a proportionality analysis. Proportionality is recognized as a general principle of law by constitutional courts and international tribunals in many countries.<sup>401</sup> Even though there are differences in applications among courts the basic idea is that larger harms should be justified by more weighty reasons and that more severe violations of the law should be more harshly sanctioned than less severe ones.<sup>402</sup>

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<sup>393</sup> Laitos “Rules of law for use and nonuse of nature” in Voigt *Rule of Law for Nature* 216.

<sup>394</sup> Burdon 2010 *AHR* 85.

<sup>395</sup> Sheehan “Realizing nature’s rule of law through rights of waterways” in Voigt *Rule of Law for Nature* 229.

<sup>396</sup> Art. 1(7) of the UDRME.

<sup>397</sup> Nur Kayacan How to resolve Conflicts Between Fundamental Constitutional Rights 18.

<sup>398</sup> Jackson 2015 *YLJ* 3096.

<sup>399</sup> González de la Vega 2008 *BMDC* 806-809.

<sup>400</sup> González de la Vega 2008 *BMDC* 807.

<sup>401</sup> Jackson 2015 *YLJ* 3096.

<sup>402</sup> Jackson 2015 *YLJ* 3098.

A wording regarding the hierarchy of rights could, hence, be the following: "Rights of nature are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the integrity, balance and health of the environment. Courts should use the principle of practical concordance and the principle of proportionality to resolve conflicts."

## 5. Conclusion

Rights of nature further the environmental protection significantly and can serve to reduce the environmental destruction caused by humans. Existing domestic rights of nature guarantee a much higher standard of protection than former environmental movements. They expand the legal armoury of present environmental law and promote a paradigm shift of the way humans perceive the environment. The examination of the existing domestic rights of nature shows that these have many things in common, but there are also some significant differences. Existing domestic rights of nature are based on similar foundations and seek to protect the environment from detrimental economic interests and bad governance. They acknowledge that natural entities possess inalienable rights and have standing to initiate legal procedures in their own name and for their own benefits. Their legal construction includes positive and negative claim-rights in order to ensure a positive duty for compensation and a negative duty of non-interference. At the same time, the existing domestic rights of nature also differ in various aspects. They are implemented differently – in a constitution, in ordinances as well as in an agreement - and do not have the same scope or approach to representation.

Several procedural and substantive constraints prevent an effective application of the existing domestic rights of nature. Three main procedural constraints raise concerns. Firstly, non-independent and poorly trained judicial and administrative institutions hamper an effective implementation and enforcement. Secondly, the respective standing doctrine of the existing domestic rights of nature obstructs a more active application of the rights. Thirdly, the accountability and legal cost provisions of the existing domestic rights of nature must be improved. Additionally, existing domestic rights of nature face three major substantive constraints. First of all, their scope must be regulated more precisely regarding the entities they protect as well as the extent of protection. Also, existing domestic rights of nature do not define thresholds above which an infringement is considered an actionable violation. Finally, existing domestic rights of nature lack clear guidance on how to balance rights of nature with human rights and with other rights of nature.

In order to design rights of nature which can be implemented and applied effectively, the lessons learned from the analysis of the existing domestic rights of nature can be drawn upon. Wording and framing of the codification should be adapted according to the success and failures of the implemented rights. Several ways exist to overcome the procedural and substantive constraints of the existing domestic rights of nature which this dissertation presents. The outlined solutions lay the bases for the proposal of guidelines for the effective domestic implementation of rights of nature (Annex 1) and a proposal for a

specific wording of a rights of nature clause (Annex 2). The wording of the draft of a constitutional rights of nature clause is based on the considerations of this dissertation and is meant to serve as an example for an ideal rights of nature norm. The guidelines for the effective domestic implementation of rights of nature summarize the most important requirements for the implementation of a rights of nature norm. The guidelines can be used as a brief instruction by legislators.

A workable domestic rights of nature provision should be embedded as a hard domestic legal instrument in a country's constitution. A constitutional implementation ensures direct application of rights of nature, implementation and enforcement by national institutions, supremacy over rights of lower legal order and a high degree of durability. In order to be effective, it is also essential that a constitutional right complies with certain general requirements. Firstly, a constitutional provision should be self-executing so that rights of nature are directly enforceable. Secondly, a rights of nature provision should be conceived as a mix of positive and negative claim-rights in order to ensure a wide protection of the environment. Finally, a constitutional codification of rights of nature should obligate the state to further secure rights of nature. Only such an obligation of the state will guarantee a further implementation of rights of nature.

To resolve the procedural constraints the following recommendations should be followed: Firstly, an independent tribunal for rights of nature and special authorities to enforce rights of nature should be established. Secondly, a limited *actio popularis* approach should be sought as it is the best way to regulate standing and representation. A limited *actio popularis* approach guarantees enough potential plaintiffs who act in the best interest of nature and not only for their benefits. Thirdly, rights of nature should include a broad concept of accountability which holds both private and public entities liable. A rights of nature norm should also determine affordable costs for legal representation and provide legal aid provision.

To overcome the substantive constraints of the existing domestic rights of nature a rights of nature norm should contain several components. Firstly, rights of nature should have a broad scope and contain a definition of nature which includes all living and non-living entities. Only a wide scope guarantees an adequate protection of the environment. However, in order to be practical, the scope of rights of nature should also be limited to a minimum core content. Each entity should be attributed its own core rights. Furthermore, to prevent an excessive application codified rights of nature should include a minimum threshold for a violation of a right of nature. Only if the threshold is crossed can a violation of the rights be assumed and damages claimed. Finally, conflicts between rights must be resolved in a way that maintains the integrity, balance and health of the environment.

However, it is important to note that rights of nature also face non-legal or contingent constraints such as economic, historical and social-political factors which may prevent the effective implementation and enforcement of rights of nature. Only if the governments around the world rethink and change their attitude and behaviour towards nature can an environmental catastrophe with devastating impacts for the human population be avoided. It is high time to overcome the anthropocentric world view and to begin valuing nature. An effective domestic rights of nature clause in every constitution is an important step to cope with the terrifying environmental challenges which threaten the earth and its inhabitants.

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## **Annex 1 – Guidelines for the Effective Domestic Implementation of Rights of Nature**

The main requirements for the effective domestic implementation of rights of nature are the following:

A rights of nature norm

1. should be implemented as a self-executing constitutional right
2. should be implemented as a mix of positive and negative claim-rights
3. should have a broad scope – “nature” in a broad sense
4. should define the term “nature”
5. should state that legislation, jurisdiction and executive must take rights of nature into account and that natural and juristic persons are bound by them
6. should state how rights of nature must be balanced with other rights and how rights of nature should be balanced amongst each other: prima facie right and not an absolute right
7. should implement minimum thresholds to limit the scope of rights of nature
8. should provide clear guidelines for further implementation: obligate the legislator to specify rights of nature; i.e. rights for different species and habitats and set timelines for the further implementation
9. should regulate the standing: a limited actio popularis approach
10. should establish a separate tribunal only for issues regarding rights of nature
11. should appoint a special authority to enforce rights of nature
12. should regulate the costs and funding for court proceedings.

## **Annex 2 – Draft Formulation of a Constitutional Rights of Nature Clause**

### **Rights of Nature**

(1) Nature has fundamental rights, including the right to exist, to have a habitat or a place to be, and to participate in the evolution of the community. Nature also has the right to be restored. Nature contains all components of the natural system, including living and non-living entities. Each entity has its specific fundamental rights. The state has the duty to implement further legislation protecting each rights-bearing entity.

(2) Not every restriction of a right of nature is a violation of the right. Only if a minimum threshold is crossed a violation of rights of nature is given. The state has the duty to develop and adjust regularly binding scientific guidelines for specific thresholds for each entity. The state must implement the guidelines two years after this norm becomes effective. The guidelines have to be developed to ensure the protection of the environment.

(3) Rights of nature of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the integrity, balance and health of Mother Earth. Courts should use the principle of practical concordance and the principle of proportionality to resolve conflicts.

(4) The state has the duty to protect nature, for the benefit of present and future generations, through reasonable legislative and other measures. Rights of nature apply to all law, and bind the legislature, the executive, the judiciary and all organs of state. Rights of nature bind natural and juristic persons. The state has the duty cooperate internationally to promote rights of nature.

(5) Any person can bring an action to defend rights of nature, as long as that person (1) can sufficiently show an actual or immanent injury in the natural object, and (2) demonstrate that the potential litigant also has a sufficient interest in the outcome. A sufficient interest means the best interest of nature.

(6) The costs for the court and legal representation of rights of nature are regulated by a specific act which must guarantee affordable costs. Any parties who, due to their personal and economic circumstances, are unable to bear the costs of litigation of rights of nature, or are able to bear them only in part or only as instalments, will be granted assistance. The granting of legal aid by the court requires that the applicant proves that the claimant is (1) economically not able to bear the costs of the procedures,

and (2) that his lawsuit has reasonable prospects of success, and (3) that the cause of action is not frivolous.

(7) The state must establish an independent tribunal for rights of nature which has exclusive jurisdiction. The judges of the independent tribunal for rights of nature are granted lifetime tenure. The state must establish special authorities to enforce rights of nature.