

CONSERVATION CRIME AND PANGOLIN POACHING: TENSIONS BETWEEN CUSTOMARY USE AND CONSERVATION LAW

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Abstract

In this paper, the author assesses the interplay between African customary use of pangolin and conservation law and to what extent the existing legislative framework undermines the heritage value of pangolins for customary communities. The author discusses the extent to which the laws governing pangolin protection in South Africa impose limitations on the customary use of pangolin for customary communities. Finally, the author considers whether customary law rights of access to and use of pangolin can or ought to coexist with conservation law. This paper aims to illustrate that the conservation laws regulating pangolin in South Africa impose excessive limitations on customary use and access to pangolin.

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1 Introduction

My research is premised on the assumption that there is legitimate customary use of pangolin in South Africa and whilst some very limited use ought to be permissible, the conservation laws inhibit all forms of customary use.¹ The term ‘customary use’ refers to the utilisation of indigenous plants and animals, by adherents of African customary law, in maintaining a customary relationship with the natural environment for purposes including traditional medicine and healing.² This paper aims to prove that the conservation laws regulating pangolin in South Africa impose excessive limitations on customary use and access to pangolin and motivates for coexistence between conservation law and customary law.³

The species focus of this paper will be the Temminck’s pangolin, or *Smutsia temminckii* – the only pangolin species found in South Africa and one of eight pangolin species globally.⁴ My research is motivated by threats to pangolin and is relevant because: (1) pangolins are the world’s most illegally trafficked mammal;⁵ (2) pangolins are highly sought after and used regularly in traditional medicine and divination in South Africa;⁶ (3) pangolins have high

- 1 D Pietersen ‘Behavioural ecology and conservation biology of ground pangolins *Smutsia temminckii* in the Kalahari Desert’ (2013) Department of Zoology and Entomology, University of Pretoria. The pangolin, or *penggulong* meaning ‘one who rolls up’ in Malay, is a toothless, ant-eating mammal endemic to regions of Asia and Africa. The animal is protected by overlapping keratinous scales which account for approximately 20 per cent of its body mass. When threatened, a pangolin’s defence mechanism involves curling into a tight ball, by tucking its head beneath its strong, muscular tail. There are eight different pangolin species across Asia and Africa. See also D Pietersen, A McKechnie & R Jansen ‘A review of the anthropogenic threats faced by Temminck’s ground pangolin, *Smutsia temminckii*, in southern Africa’ (2014) 44 *South African Journal of Wildlife Research* at 167.
- 2 S Weaver ‘The Call of the Kererū: The Question of Customary Use’ (1997) 9(2) *The Contemporary Pacific* at 383.
- 3 W Wicomb & H Smith ‘Customary communities as “peoples” and their customary tenure as “culture”: What we can do with *Endorois* decision’ (2011) 11 *African Human Rights Law Journal* at 423; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 2011. The term ‘customary communities’ is used to denote communities who regulate their lives in terms of customary law, referring to a broader group of individuals than those circumscribed by the definitions of ‘indigenous’ and ‘tribal’ persons in international law instruments.
- 4 Pietersen, McKechnie & Jansen (n 1) 167. The Temminck’s pangolin is the most widespread of the four African pangolin species, whose distribution ranges from northern South Africa, throughout most of East Africa, and into southern Sudan and Chad. See also D Pietersen et al ‘*Smutsia temminckii*’. The IUCN Red List of Threatened Species 2014’ 2015 <http://dx.doi.org/10.2305/IUCN.UK.2014-2.RLTS.T12765A45222717.en> (accessed 20 October 2019).
- 5 T Knight ‘Scaling up protection of Earth’s most heavily poached and trafficked mammal’ *Daily Maverick* 06 September 2019 <https://www.dailymaverick.co.za/article/2019-09-06-scaling-up-protection-of-earths-most-heavily-poached-and-trafficked-mammal/> (accessed 20 October 2019).
- 6 A Baiyewu et al ‘Ethnozoological Survey of Traditional Uses of Temminck’s Ground Pangolin (*Smutsia temminckii*) in South Africa’ (2018) 26(3) *Society & Animals* at 12.

conservation and intrinsic value, which limits the uses that ought to be made of them;⁷ and (4) the traditional practices of customary communities, including their legitimate uses of pangolins, ought to be respected.⁸ To foreground my discussion on the harmonisation of conservation laws and customary law, what follows is a series of introductory remarks on the threats to pangolins, the uses and significance of pangolins, the drivers of pangolin poaching, the current legal response to curbing pangolin poaching in South Africa, and the methodology of this article.

1.1 Threats to pangolins

The threats to pangolins are both national and international, however, the substantial drivers of pangolin extinction are believed to be issues of an increasingly cross-border nature.⁹ The transnational illegal wildlife trade is threatening the survival of all eight species of pangolin because the regeneration of wild populations cannot meet the rate of poaching and the exorbitant demand for pangolin products in southeast Asia.¹⁰ In an assessment report released by the International Union for Conservation of Nature (IUCN) in December 2019, three out of the eight pangolin species were declared to be facing severe survival threats due to poaching pressures.¹¹ Although the Temminck's pangolin is currently categorised as 'Vulnerable' (as opposed to 'Endangered' or 'Critically Endangered') on the IUCN Red List, it is only a matter of time before increased poaching pressures affect southern African pangolin populations on a detrimental scale because populations are decreasing.¹²

Approximately 100 000 Asian and African pangolins are poached annually, with the illegal trade in pangolin scales alone being estimated at R644 million per year.¹³ Recent data recording the seizures of illegally traded goods in primary markets such as China and Vietnam, as well as in transit hubs like Singapore and Hong Kong, suggests that the number of pangolins in the illegal wildlife trade is increasing and that, as Asian pangolin populations decrease, poaching

7 D Challender et al 'Taking pangolin conservation to scale' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 609.

8 M Walsh 'Symbolism, myth and ritual in Africa and Asia' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 208.

9 S Harrop 'Conserving pangolins through international and national regulation and effective law enforcement' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 283.

10 A Gupta 'Poaching driving three pangolin species toward extinction: report' 20 December 2019 <https://news.cgtn.com/news/2019-12-20/Poaching-driving-three-pangolin-species-toward-extinction--MzLmkwx5ba/index.html> (accessed 17 January 2020).

11 D Pietersen et al (n 4).

12 D Pietersen et al (n 4).

13 A Minaar 'Conservation crime, wildlife trafficking and organised crime' (2018) 31 *Acta Criminologica: Southern African Journal of Criminology & Victimology* at 3.

pressures are steadily transferring from Asia to Africa.¹⁴ Between April and July 2019, for example, Singaporean customs officials intercepted 37.5 tonnes of pangolin scales, *en route* to Vietnam from Nigeria.¹⁵ However, Interpol estimates that nine out of every ten illegally trafficked pangolins are undetected by authorities, meaning that existing seizures data probably only represents one-tenth of the actual illegal trade in pangolins.¹⁶

Pangolin scales form an integral part of Traditional Chinese Medicine (TCM).¹⁷ The perceived medicinal value and the high price of pangolin scales have bolstered the cultural value of pangolin across East and Southeast Asia, leading to it becoming a luxury wildlife product for affluent consumers.¹⁸ Arguably, the scale of the demand for pangolins and derivative products in Asia is illustrative of the neo-liberal capitalist propensity towards the commodification of nature.¹⁹ As an unfortunate by-product of increasing wealth and a growing middle class in China and Vietnam, the levels of demand are proving unsustainable for the dwindling populations of the species, with upwards of one million pangolins trafficked in the last decade.²⁰

14 T Ullmann, D Veríssimo & D Challender 'Evaluating the application of scale frequency to estimate the size of pangolin scale seizures' (2019) 20 *Global Ecology and Conservation* <https://www.sciencedirect.com/science/article/pii/S235198941930424X> (accessed 15 January 2020).

15 Al Jazeera 'Singapore seizes pangolin scales, ivory worth over \$48m' *Aljazeera* 23 July 2019 <https://www.aljazeera.com/news/2019/07/singapore-seizes-pangolin-scales-ivory-worth-48m-190723073748818.html> (accessed 15 January 2020).

16 T Yao-Cheng et al 'The Pangolin Reports' *Trafficked to Extinction* <https://globalstory.pangolinreports.com/#china-coda> (accessed 16 January 2020).

17 A Aisher 'Scarcity, Alterity and Value Decline of the Pangolin, the World's Most Trafficked Mammal' (2016) 14 *Ashoka Trust for Research in Ecology and the Environment* at 320.

18 Aisher (n <XREF>) 320.

19 J Cock "'Green Capitalism' or Environmental Justice? A Critique of the Sustainability Discourse' (2011) 63 *Focus* at 51. Neoliberalism is generally understood as a new stage in the growth of capitalism, having evolved from the wake of the 'post-war-boom'. Neoliberalism is understood as encompassing three intertwined characteristics, namely: an apparatus of institutions, policies, and practices; a structure of economic, social, and political reproduction characterised by financialisation; and a system of capitalism for the minority and against the majority. Neoliberalism is a complex system of multifaceted ideological, practical, and policy features and is characterised by strong private property rights, free markets, and free trade. See also K Bayliss et al '13 Things you need to know about neoliberalism' (2016) 43 *New Agenda: South African Journal of Social and Economic Policy* at 25; and D Harvey *A brief history of neoliberalism* (2005) at 71.

20 A Andersson 'China's Appetite for Pangolin is Threatening the Creature's Existence' 12 June 2014 <https://time.com/2846889/pangolins-china-cites-trafficking-endangered/> (accessed 16 October 2019); WildAid 'Pangolins are the world's most heavily-trafficked wild mammals' <https://wildaid.org/programs/pangolins/> (accessed 7 January 2020).

1.2 Uses and significance of pangolin

In Africa, pangolins are sourced as bushmeat and utilised traditionally for the treatment of various physical infirmities and as spiritual antidotes.²¹ Despite a relatively sparse body of literature, a recent ethnozoological survey of the traditional uses of Temminck's pangolin operates as a useful tool in ascertaining the significance of the animal across South Africa.²² The survey was conducted in four out of the nine provinces, namely; KwaZulu-Natal, Mpumalanga, Limpopo, and North West, with participants from the Sepedi, isiZulu, Tsonga, Tswana, Venda, Ndebele, and Swati speaking communities.²³

Respondents from the participating communities illustrated the cultural magnitude of the pangolin in numerous ways.²⁴ It appears that the pangolin represents both a good and bad omen and is generally perceived to have connections to thunder, lightning strikes, and rain.²⁵ Children in these communities are cautioned against maiming the animal for fear of causing drought and famine.²⁶ Across these communities, pangolin scales are used as talismans to protect against evil forces and are often carried in wallets or stored in vehicles to protect passengers from accidents.²⁷ Moreover, for reasons not stipulated, women are forbidden from handling both dead and live pangolins.²⁸

In the Sepedi community, pangolins are never killed during the rainy season because it is believed that drought will ensue.²⁹ Additionally, pangolins are utilised in traditional veterinary medicine and animal husbandry to enhance fertility in cattle and protect livestock against predators.³⁰ The burning of pangolin scales is thought to improve the health of livestock and repel lions.³¹

In the Tswana and Venda communities, the person who initially sights a pangolin is afforded special treatment by the chief and tribesmen.³² These communities also believe that bad luck follows if pangolin blood is spilt in a village, hence pangolins are slaughtered over repositories to assist in the collection of blood.³³

21 Baiyewu et al (n 6) 2.

22 Baiyewu et al (n 6) 5.

23 As above.

24 Baiyewu et al (n 6) 9.

25 Baiyewu et al (n 6) 10.

26 As above.

27 Baiyewu et al (n 6) 14.

28 As above.

29 Baiyewu et al (n 6) 10.

30 Baiyewu et al (n 6) 15.

31 As above.

32 Baiyewu et al (n 6) 10.

33 Bräutigam et al 'Recent Information on the Status and Utilization of African Pangolins' (1994) 15 *TRAFFIC Bulletin* at 17.

The Lobedu community of the Limpopo Province believes that Temminck's pangolins traditionally belong to the queen and must be captured alive.³⁴ The animals' fat is utilised in making so-called 'rain medicine', which the queen uses in her role as a rainmaker.³⁵

The survey concluded that the Temminck's pangolin is still highly sought after and used regularly in traditional medicine and divination in South Africa, whilst revealing several restrictions on the uses of pangolin and illustrating that communities have the utmost respect for the animal and its connection to nature.³⁶ Most of the respondents were middle-aged or elderly persons, suggesting that the younger generation is less familiar with the pangolin due to its increased scarcity, or that most people belonging to the younger generation have moved to urban areas.³⁷ The survey also noted that members of these communities are aware, not only of the heritage value and need to conserve pangolin, but also of the perceived economic value thereof.³⁸ This awareness of the pangolin's economic value may contribute to the indiscriminate hunting and poaching of the animal.³⁹ Another troubling finding was that the same community members who rely on pangolins for customary use may also turn to poaching because of their poor socio-economic circumstances and the financial relief that pangolin poaching may provide them.

The high monetary value attached to pangolins epitomises the commodification of nature as a central feature of the contemporary period of neoliberal capitalism.⁴⁰ For example, Baiyewu et al's survey concluded that even the customary communities, particularly the younger generations, are aware of the perceived attractive economic value of pangolins.⁴¹ According to Professor Raymond Jansen, Chairperson of the African Pangolin Working Group, the majority of poachers that are intercepted in South Africa are financially destitute people who have turned to crime.⁴² A recent report by a global non-governmental organisation, TRAFFIC, on the demographics of offenders and their activities in the illegal wildlife trade in South Africa revealed that 86% of poachers did not reach or complete secondary school and 38% were unemployed.⁴³ This is an unfortunate characteristic of the illegal wildlife trade – the poachers, who are

34 Walsh (n 8) 204.

35 As above.

36 Baiyewu et al (n 6) 12.

37 Baiyewu et al (n 6) 15.

38 Baiyewu et al (n 6) 16.

39 As above.

40 Cock (n) 51.

41 Baiyewu et al (n 6) 16.

42 A Alim 'Stop the Illegal Wildlife Trade: How pangolins became the ultimate luxury good' 01 September 2020 <https://www.independent.co.uk/environment/pangolin-scales-trafficking-africa-stop-illegal-wildlife-trade-ivory-drugs-a9696041.html> (accessed 14 October 2020).

43 S Moneron, A Armstrong & D Newton 'The people beyond the poaching: Interviews with convicted offenders in South Africa' (2020) *TRAFFIC Report* at 10.

driven to crime through greed or desperation, are the ones confronted with lengthy prison sentences, whilst the traders, smugglers, and wealthy consumers who derive benefit from the globalisation of crime,⁴⁴ often escape the clutches of the law because they tend to have enough wealth and political connections to ensure protection from the authorities.⁴⁵

In South Africa, Temminck's pangolin is available in traditional medicine markets and is marketed as a remedy for a range of ailments.⁴⁶ Although the magnitude of the threat to pangolins by the *umuthi* trade in South Africa has not yet been quantified, the scale of use in traditional medicine is known to be high in both urban *umuthi* markets and rural areas.⁴⁷ While such use might have been historically sustainable, evidence suggests that this is no longer the case and that the species has been eliminated from parts of its distribution range due to overexploitation for *umuthi*, food, or for presentation to tribal chiefs and statesmen as gifts.⁴⁸ Based on anecdotal evidence from Professor Raymond Jansen of the African Pangolin Working Group, the scale of use by members of customary communities is not an immediate threat to pangolins in South Africa.⁴⁹ For example, traditional health practitioners use only a few grams of pangolin scale powder when dispensing to a patient.⁵⁰ Therefore, although many traditional health practitioners keep pangolin scales in their inventories, these scales can last a number of years due to the very low volumes dispensed at any one time.⁵¹ For this reason, Professor

44 K Zhang & J Xu 'Pangolin scale smugglers: a few culprits caught, but masterminds behind illegal wildlife trade evade arrest' 3 February 2020 <https://www.scmp.com/news/hong-kong/health-environment/article/3048633/pangolin-scale-smugglers-few-culprits-arrested> (accessed 5 November 2020). For example, Chinese customs officials and local police recently raided the premises of a suspected international wildlife smuggling syndicate led by prominent Hong Kong businessman, Wong Muk-nam and although a few perpetrators were apprehended, the masterminds behind the operation evaded arrest. Chinese court documents illustrate that between 2014 and 2016, Wong and his associates smuggled at least three shipments of pangolin scales, worth \$547 000, from Nigeria to his factory in the Guangdong Province, with the cargo passing through South Korea, Hong Kong, and the southern Chinese city of Shenzhen.

45 Alim (n 42); United Nations Office on Drugs and Crime 'World Wildlife Crime Report: Trafficking in protected species' (2020) at 68.

46 A Kriel 'Curbing consumption of pangolins' 10 July 2019 <https://africanpangolin.org/2019/07/10/in-the-news-curbing-consumption-of-pangolins/> (accessed 14 January 2020). These ailments include epilepsy, infertility, and cancer.

47 Pietersen, McKechnie & Jansen (n 2) 172; Baiyewu et al (n 6) 2.

48 D Pietersen et al 'Temminck's pangolin *Smutsia temminckii* (Smuts, 1832)' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 190; Pietersen et al 'A conservation assessment of *Smutsia temminckii*' in M Child et al (eds) *The Red List of Mammals of South Africa, Swaziland and Lesotho* (2016) at 3.

49 A Kriel 'The traditions and beliefs threatening the endangered pangolin' 5 July 2019 <https://old.earthjournalism.net/stories/the-culture-driving-the-illegal-trade-of-the-endangered-pangolin> (accessed 15 October 2020).

50 Kriel (n 49).

51 As above.

Raymond Jansen has drawn the tentative conclusion that such use is currently sustainable.⁵² Ultimately, there are no definitive findings to suggest that the scale of customary use is, in fact, ecologically sustainable. An argument in favour of the coexistence of conservation law and customary law could be made in the future, subject to further research that illustrates the extent of pangolin use and whether customary communities hold comparable internal sustainable measures to those evidenced by the communities in *Gongqose*, which I will discuss below.

1.3 Drivers of pangolin poaching

In pursuit of the illegal wildlife trade, a variety of anthropogenic factors are threatening Temminck's pangolin populations, some rooted in poverty and need, and others in profit and greed.⁵³ However, almost all of them originate from a neo-liberal commodification of nature because exorbitant monetary values are attached to pangolins on the illegal wildlife market.⁵⁴

Although overexploitation in rural areas might be contributing to population decline, overexploitation by poaching for the international consumer markets of the illegal wildlife trade is the foremost threat to pangolins.⁵⁵ How much of the hunting and trade in pangolins in South Africa is intended for the transnational illegal wildlife trade or domestic use is unclear.⁵⁶ However, the nature and circumstances surrounding recent seizures suggest links between rapid pangolin population decline and transnational and intercontinental trade, rather than local use.⁵⁷

1.4 Current legal response to curb pangolin poaching in South Africa

The scale of the transnational illegal wildlife trade explains why contemporary national and international legal responses have opted for a more fortress-oriented approach to pangolin conservation,

52 Kriel (n 49).

53 K Abotsi, P Galizzi & A Herklotz 'Wildlife crime and degradation in Africa: An analysis of the current crisis and future prospects for a secure future' (2016) 27 *Fordham Environmental Law Review* at 395.

54 Abotsi, Galizzi & Herklotz (n 53) 395; Alim (n 42).

55 D Challender et al 'International trade and trafficking in pangolins, 1900-2019' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 271. These threats are not exhaustive and include electrocution by electrified fences, traditional medicinal (*umuthi*) use, the bushmeat trade, road mortalities, gin traps, habitat loss, poisoning, and the pet trade. See also Pietersen, McKechnie & Jansen (n) 167.

56 D Challender & L Hywood (2012) 'African pangolins under increased pressure from poaching and intercontinental trade' (2012) 24 *Traffic Bulletin* at 54.

57 Challender & Hywood (n 56) 54.

meaning that the interests and traditional practices of customary communities are excluded.⁵⁸ The prevailing uncertainty surrounding the number of pangolins in the illegal wildlife trade is another reason why policymakers have opted for a more precautionary approach to pangolin conservation. Notwithstanding this uncertainty, to preserve dwindling species' numbers, South Africa has clamped down on poaching by adopting a so-called 'command-and-control' approach to pangolin conservation by imposing restrictions and extensive penalties.⁵⁹ Command-and-control approaches to conservation are widely criticised for their unresponsiveness to the complexities of humanity's contemporary interactions with nature.⁶⁰ Ultimately, command-and-control approaches only respond to the poachers (and perhaps some of the intermediaries, such as traders and smugglers) in the trafficking supply chain of pangolin, and not those who are driving the illegal trade in the first place.⁶¹ Furthermore, command-and-control measures disproportionately criminalise the poor and vulnerable, whilst being unable to target the wealthy and influential perpetrators further down the trafficking supply chain.⁶²

1.5 Methodology

By encouraging greater respect for the traditional practices of customary communities and casting doubt on the effectiveness of a fortress-oriented approach to conservation, this paper explores the possibility of adopting a more custodianship approach towards pangolin conservation. In contrast to a fortress-oriented approach, a custodianship approach to conservation is founded on inclusion and participation, casting local people as custodians, rather than the principal threats to wildlife and natural habitats.⁶³ Also known as community conservation, this approach is presented as a means of reconciling conservation and development objectives by considering the interests of local communities.⁶⁴ In this paper, the possibility of adopting a more custodian approach to conservation is explored

58 Abotsi, Galizzi & Herklotz (n) 397; B Büscher 'Reassessing Fortress Conservation? New Media and the Politics of Distinction in Kruger National Park' (2016) 106 *Annals of the American Association of Geographers* at 114.

59 R Fletcher 'Neoliberal environmentalism: Towards a poststructuralist ecology of the conservation debate' (2010) 8 *Conservation and Society* at 172.

60 C Holling & G Meffe 'Command and Control and the Pathology of Natural Resource Management' (1996) 10 *Conservation Biology* at 329.

61 United Nations Office on Drugs and Crime (n 45) 69.

62 United Nations Office on Drugs and Crime (n 45) 69.

63 A Paterson & M Mkhulisi 'Traversing South Africa's Conservation and Land Reform Objectives: Lessons from the Dwesa-Cwebe Nature Reserve' (2014) 131 *South African Law Journal* at 365.

64 W Adams & D Hulme 'If community conservation is the answer in Africa, what is the question?' (2001) 35 *Oryx* at 194.

through the African philosophical adage of ubuntu as an ecophilosophy.⁶⁵ Ubuntu originates from the isiXhosa expression 'umuntu ngumuntu ngabanye bantu', meaning that our full humanity is experienced through relationships with others.⁶⁶

According to Le Grange, the purpose of an ecophilosophy is to explore a range of human-nature relationships, to foster 'deeper and more harmonious relationships between place, self, community, and the natural world'.⁶⁷ Le Grange argues that ubuntu is consistent with ecophilosophy in that it embodies the principle of wholeness between human beings and physical nature.⁶⁸ Ubuntu implies a duty of care for fellow humans and by implication, care for one's natural environment and the other living beings within it.⁶⁹ Arguably, without such care, the interdependence between humans and physical nature would be undermined.⁷⁰

In the next section, the national and international legislative framework regulating pangolin conservation in South Africa will be outlined and discussed. Thereafter, the effects of the conservation laws on customary use and heritage value of pangolin for customary communities will be analysed in the third section. In the fourth section, the possibility for the coexistence of the conservation laws and customary law will be explored, with reference to recent case law that provides a compelling argument in favour of harmonisation. Finally, consideration will be given to the possibility for the coexistence of conservation laws and customary law in relation to pangolin, with reference to the principles of intergenerational equity and ubuntu as an ecophilosophy, respectively.

2 South Africa's national and international legislative framework regulating Temminck's pangolin

To begin with, it is necessary to consider the conservation laws regulating pangolin conservation and use in South Africa. Pangolins are regulated in terms of both national and provincial biodiversity legislation. However, it is also acknowledged that outdated provincial legislation often stifles the proper judicial protection of pangolins.⁷¹

65 L Le Grange 'Ubuntu/Botho as Ecophilosophy and Ecosophy' (2015) 49 *Journal of Human Ecology* at 303.

66 L Le Grange 'Ubuntu, Ukama and the Healing of Nature, Self and Society' (2012) 44 *Educational Philosophy and Theory* at 61.

67 Le Grange (n 65) 61.

68 Le Grange (n 65) 305.

69 Le Grange (n 66) 63.

70 M Ramose 'Ecology through Ubuntu' in R Meinhold (ed) *Environmental Values: Emerging from Cultures and Religions of the ASEAN Region* (2015) at 70.

71 Ramose (n 70) 70.

Furthermore, a plethora of outdated provincial legislation exists which is yet to be harmonised with the sentencing objectives of the national enabling legislation.⁷²

For the sake of brevity, only the national legislative framework will be discussed in this paper.⁷³ The conservation laws include: relevant provisions of the Constitution of the Republic of South Africa, 1996;⁷⁴ the National Environmental Management Act 73 of 1998 (NEMA);⁷⁵ the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA);⁷⁶ the Threatened or Protected Species Regulations (ToPS Regulations);⁷⁷ the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); and the Convention on Biological Diversity (CBD).⁷⁸ Although not conservation legislation, the Traditional Health Practitioners Act 35 of 2004 (THPA) will be discussed in this section, insofar as it operates as a possible avenue for the customary use of pangolin.⁷⁹ In conjunction with the THPA, in the next section, I will turn to a discussion of relevant case law to unlock the possibility of acknowledging the customary use of pangolin in the future.

2.1 Laws regulating pangolin conservation in South Africa

According to a policy brief by Enact and the Institute for Security Studies, with regards to wildlife legislation at national and provincial levels, South Africa has the most progressive legislation, globally, aimed at protecting pangolins.⁸⁰ Section 24 of the Constitution enshrines an environmental right in South Africa and is the

72 For example, sec 86(1) of the Mpumalanga Nature Conservation Act 10 of 1998 empowers the responsible member of the provincial legislature to make regulations pertaining to the administration of various biodiversity matters. Sec 86(4) provides for the imposition of a fine or a period of imprisonment not exceeding three years, or both a fine and such imprisonment for contravention of these provincial regulations.

73 Examples of provincial legislation pertaining to pangolin conservation that will not be addressed in this article are the Limpopo Environmental Management Act 7 of 2003 and the Mpumalanga Nature Conservation Act 10 of 1998.

74 Constitution of the Republic of South Africa, 1996 (Constitution) sec 24.

75 National Environmental Management Act 73 of 1998 (NEMA) secs 1(1)(xi) & 2.

76 National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) secs 3, 5, 56, 57, 80, 87, 101 & 102.

77 Threatened or Protected Species Regulations Notice 255 of 2015 published in Government Gazette No. 38600 of 31 March 2015 (ToPS Regulations) Regulations 122-123.

78 Convention on Biological Diversity (Rio de Janeiro) (adopted 5 June 1992, in force 29 December 1993) to which South Africa is a contracting state party, having ratified the Convention on 31 January 1996 (CBD) Arts 2 & 6.

79 Traditional Health Practitioners Act 35 of 2004 (THPA) sec 21.

80 R Chelin 'A question of scales: Assessing strategies for countering illegal trafficking of pangolins in Africa' October 2019 <https://enactafrica.org/research/policy-briefs/a-question-of-scales-assessing-strategies-for-countering-illegal-trafficking-of-pangolins-in-africa> 10 (accessed 7 January 2020).

cornerstone of the discussion on the laws regulating pangolin conservation, as an aspect of ‘the environment’.⁸¹

NEMA is an important piece of conservation legislation that gives effect to section 24 of the Constitution, with which all specific environmental legislation must be read.⁸² NEMA defines the environment as: ‘the surroundings within which humans exist and that are made up of, *inter alia*, microorganisms, plant and animal life’.⁸³ Therefore, in accordance with NEMA, animals, including pangolins, must be included within the scope of protection afforded to the environment in section 24 of the Constitution.

NEMBA regulates the conservation of pangolin in South Africa. Within the context of international law, section 5 of NEMBA provides that where South Africa has ratified international agreements affecting biodiversity, these obligations ought to be fulfilled.⁸⁴ In this vein, it is important to consider the implications of South Africa’s international obligations under CITES – a multilateral agreement on biodiversity and sustainable use – when establishing domestic regulation of pangolin. At the 17th meeting of the Conference of the Parties to CITES, an international commercial trade ban on all eight species of pangolin was imposed.⁸⁵ Under CITES Notification No. 2016/063, pangolins are afforded Appendix I status which applies to ‘all species threatened with extinction which are or may be affected by trade’, meaning that there is a zero annual export quota of pangolin.⁸⁶ Under CITES, South Africa has both an international and domestic obligation to conserve its biodiversity and to protect threatened and endangered species, including pangolin.⁸⁷ Although this certainly includes an obligation to eliminate the commercial use

81 Section 24 of the Constitution, (n 74), governs the rights of everyone to an environment. See also D Bilchitz ‘Exploring the relationship between the environmental right in the South African Constitution and protection for the interests of animals’ (2017) 134 *South African Law Journal* at 745; and *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124 (W) para 145.

82 M Murcott ‘Transformative Environmental Constitutionalism’s Response to the Setting Aside of South Africa’s Moratorium on Rhino Horn Trade’ (2017) 6 *Humanities* at 87.

83 Section 1(1)(xi) of NEMA, (n 75), defines the ‘environment’ as the surroundings within which humans exist and that are made up of (i) the land, water, and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii), and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

84 Section 5 of NEMBA, (n 76), pertains to the application of international agreements affecting biodiversity to which South Africa is a party and which bind the Republic.

85 Notification to the Parties 2016/063, *Amendments to Appendices I and II of the Convention*, Convention on International Trade in Endangered Species of Wild Fauna and Flora (29 November 2016).

86 Challenger (n 55) 265.

87 *Kruger v Minister of Water and Environmental Affairs* 2016 (1) All SA 565 (GP) (*Kruger*) para 26.

of pangolin, it also potentially entails an obligation to curtail the traditional use of pangolin by customary communities.

In accordance with section 56 of NEMBA, the Minister of Environmental Affairs (the Minister) is empowered to publish lists of species that are threatened or protected, as well as a list of prohibited activities and exemptions from restriction.⁸⁸ These lists are published in the ToPS Regulations, which categorise pangolin as a vulnerable terrestrial mammal species because they are 'facing an extremely high risk of extinction in the wild in the medium-term future'.⁸⁹ Section 57(1) of NEMBA provides that no one may carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of Chapter 7.⁹⁰ Chapter 7 of NEMBA pertains to the issuing of permits that authorise the conduct of restricted activities involving specimens of, *inter alia*, listed threatened or protected species and activities regulated in terms of section 57(2).⁹¹

Section 57(2) of NEMBA confers on the Minister the power to prohibit certain activities, however, there are only two reported instances of this occurring: the domestic trade in rhino horn, which has subsequently been reviewed and set aside;⁹² and the trade of certain cycads.⁹³ The Minister has not yet explicitly prohibited any activities in relation to pangolin specifically. Based on the ToPS Regulations, it is not a restricted activity to have or exercise physical control over individual pangolins or to cause specimens to multiply within an extensive wildlife system.⁹⁴ However, this does not include

88 ToPS Regulations (n 77).

89 Section 56 of NEMBA, (n 76), refers to the listing of species that are threatened or in need of national protection.

90 Section 1 of NEMBA, (n 76), defines a restricted activity in relation to a specimen of a listed threatened or protected species as, *inter alia*, hunting, catching, capturing or killing any living specimen by any means; gathering, collecting or plucking; damaging or destroying; importing into and exporting from the Republic; having in possession or exercising physical control over; breeding or causing it to multiply; conveying, moving or translocating; and selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift. Correspondingly, Chapter 7 of NEMBA governs the issuing of permits.

91 Section 87 of NEMBA, (n 76), outlines the purpose of Chapter 7 pertaining to permits.

92 *Kruger* (n 87).

93 Notice 382 of 2012 published in Government Gazette No. 35343 of 14 May 2012 pertains to the prohibition of trade in certain *Encephalartos* (cycad) species.

94 According to Regulation 1 of the ToPS Regulations, (n 77), an 'extensive wildlife system' is a natural environment: that is of sufficient size for the management of free roaming populations of a listed threatened or protected species, irrespective of whether it is fenced or not; meets the ecological requirements of the populations of listed threatened or protected species; and where no minimal human intervention is required in the form of, *inter alia*, the provision of healthcare or water.

having or exercising control over individual pangolins in a controlled environment.⁹⁵

Although NEMBA and the ToPS Regulations do not explicitly prohibit the use of pangolin, such use is regulated through permits, and it appears that permits have not yet been granted for purposes of customary use. In accordance with section 57(4) of NEMBA, the ToPS Regulations stipulate that only members of: (i) the South African Police Force and members of the South African Revenue Services, Customs Division in the execution of their official duties, in relation to the carrying out of restricted activities;⁹⁶ and (ii) veterinarians in the performance of various listed functions, may perform the following restricted activities in relation to pangolin: to have in their possession or exercise physical control over specimens of the species; or cause specimens to multiply.⁹⁷ Therefore, the performance of any other restricted activity by persons or categories of persons not exempted by the Minister, without a permit, will constitute an offence under the ToPS Regulations.⁹⁸

Chapter 9 of NEMBA pertains to offences and penalties in terms of national legislation. Section 101 of NEMBA identifies punishable offences, whilst section 102 establishes the penalties which include the imposition of a fine not exceeding R10 million or imprisonment for a period not exceeding ten years or both such a fine and imprisonment.⁹⁹ However, Chapter 13 of the ToPS Regulations creates lesser offences and penalties than those contained within NEMBA.¹⁰⁰ Regulation 123 stipulates that persons convicted of an offence are liable, upon conviction, to a fine not exceeding R5 million or imprisonment for a period not exceeding five years or both such fine

95 In terms of Regulation 1 of the ToPS Regulations, (n 77), a 'controlled environment' is an enclosure of insufficient size for the management of self-sustaining populations of listed threatened or protected species and is designed to hold the specimens in such a population in a manner that *inter alia*: prevents them from escaping; and facilitates intensive human intervention or manipulation, and may facilitate the intensive breeding or propagation of specimens of a listed threatened or protected species.

96 Schedule 2(a)(i) of the ToPS Regulations, (n 77), stipulates that members of the South African Police Services and the South African Revenue Services, Customs Division may acquire, receive, possess, transport, and dispose of pangolin in relation to the confiscation and subsequent handling of specimens thereof, in the execution of their official duties.

97 The ToPS Regulations pertain to the publication of lists of species that are threatened or protected, activities that are prohibited, and exemptions from these restrictions.

98 Chapter 13 of the ToPS Regulations, (n 77), pertains to offences and penalties, which will be discussed in greater detail below.

99 Section 102(1) of NEMBA, (n 76), stipulates the penalties applicable to persons convicted of an offence involving a specimen of a listed threatened or protected species.

100 Chapter 13 of the ToPS Regulations, (n 77), consists of Regulations 122 and 123 which pertain to offences and penalties, respectively.

and imprisonment.¹⁰¹ Moreover, only in the case of a second or subsequent conviction under the ToPS Regulations, is a convicted person liable for imprisonment for a period not exceeding ten years or a fine not exceeding R10 million, or both such fine and imprisonment.¹⁰²

Considering that pangolin constitutes an ‘indigenous biological resource’ for purposes of NEMBA,¹⁰³ it is necessary to consider the relevance, if any, of Chapter 6 of NEMBA. Chapter 6 pertains to bioprospecting,¹⁰⁴ access, and benefit-sharing.¹⁰⁵ Bioprospecting refers to a limited group of activities undertaken by a small number of commercial sectors and not to academic or conservation research on biodiversity.¹⁰⁶ According to part (d) of the definition of ‘bioprospecting’, the use of pangolin for traditional medicine might involve bioprospecting, however, further research is required to ascertain the nature and extent of the use of pangolin in traditional medicine to respond to this issue.¹⁰⁷ Considering that bioprospecting is aimed at harnessing traditional knowledge for purposes of the commercial or industrial exploitation of biological resources, I do not believe that the provisions of Chapter 6 are relevant to this discussion. The basis of this assertion is twofold: first, small-scale customary use does not operate on a commercial or industrial scale; and secondly, there are no proven medicinal benefits to pangolin consumption.¹⁰⁸ However, there is still an argument to be made in favour of sustainable customary use of pangolins, which constitutes an integral part of cultural beliefs, by adopting a more custodianship approach to pangolin conservation.

The general approach to South Africa’s conservation laws can be described as fortress-oriented, in that the interests and traditional

101 Regulation 123 of the ToPS Regulations, (n 77), prescribe the penalties applicable to persons convicted of an offence in terms of Regulation 122.

102 Regulation 123(1)(d) of the ToPS Regulations (n 77).

103 Sections 1 and 80(2) of NEMBA, (n 76), define ‘indigenous biological resources’ in relation to bioprospecting as, *inter alia*, any resource consisting of any living or dead animal, plant, or other organism of an indigenous species; any derivative of such animal, plant or other organism; or any genetic material of such animal, plant, or other organism.

104 Section 1 of NEMBA, (n 76), defines ‘bioprospecting’ in relation indigenous biological resources as, *inter alia*, any research on or development or application of indigenous biological resources for commercial or industrial exploitation.

105 Section 1 of NEMBA, (n 76), defines ‘benefit’, in relation to bioprospecting, as any benefit, whether commercial or not, arising from bioprospecting involving indigenous biological resources and includes both monetary and non-monetary returns.

106 R Wynberg ‘Bioprospecting, access and benefit-sharing in South Africa: Towards a strategic assessment’ (2004) at 8.

107 NEMBA (n 76) sec 1(d). This section provides a possibility for bioprospecting in relation to the use of pangolin for traditional medicine insofar as it relates to ‘the trading in indigenous biological resources in order to develop and produce products, such as drugs ...’.

108 X Jin et al ‘Evidence for the medicinal value of Squama Manitis (pangolin scale): A systematic review’ (2021) 10 *Integrative Medicine Research* at 6.

practices of customary communities are excluded.¹⁰⁹ In its present form, this approach seems to be diametrically opposed to the philosophical underpinnings of ubuntu as an ecophilosophy.¹¹⁰ By imposing restrictions and extensive penalties on the access to and use of many natural resources, South Africa's conservation laws proceed from the point of departure that the erection of fences and the imposition of fines are the best way to protect biodiversity.¹¹¹ Fortress conservation is criticised for many reasons, including how the management of protected areas and wildlife is detached from the everyday lives of local people.¹¹² The distinction between a fortress-oriented and a custodianship approach to conservation represents a historical juxtaposition between local people and conservation success, which will be discussed in greater detail in the next section.¹¹³ The following subsection turns to a discussion on the laws that specifically regulate pangolin use in South Africa.

2.2 Laws regulating pangolin use in South Africa

Despite an extensive body of legislation regulating pangolin conservation from a fortress-oriented perspective, there is no legislation directly regulating the use of terrestrial resources, including pangolin, with specific attention on customary use and the traditional way of life of customary communities.¹¹⁴ The THPA indirectly regulates the use of pangolin, as discussed below.

Notwithstanding the absence of the direct regulation of pangolin use in South Africa, NEMA, which should be read alongside NEMBA, contains various indications that a more inclusive, custodianship approach to pangolin conservation should be adopted.¹¹⁵ The first indication of this is contained in section 2(2) of NEMA which stipulates that environmental management must serve, amongst other things, the cultural and social interests of people equitably.¹¹⁶ Secondly,

109 Abotsi, Galizzi & Herklotz (n <XREF>) 395; B Büscher 'Reassessing Fortress Conservation? New Media and the Politics of Distinction in Kruger National Park' (2016) 106 *Annals of the American Association of Geographers* at 114.

110 Le Grange (n 65) 305.

111 Adams & Hulme (n 64) 193.

112 P Steyn 'The Environmental Legacy of the Apartheid Era' (2005) 2 *Globalizations* at 394.

113 H Siurua 'Nature above People: Rolston and "Fortress" Conservation in the South' (2006) 11 *Ethics and the Environment* at 87.

114 L Monyamane & M Bapela 'Gongqose v Minister of Agriculture, Forestry and Fisheries – A Tale of Customary Rituals and Practices in Marine Protected Areas' (2019) 22 *Potchefstroom Electronic Law Journal* at 9.

115 Section 2(1)(e) of NEMA, (n 75), stipulates that the principles contained in Chapter 1 shall guide the interpretation, administration, and implementation of the Act and any other law concerned with the protection or management of the environment.

116 Section 2(2) of NEMA, (n 75), provides that environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural, and social interests equitably.

section 2(4)(d) of NEMA provides for equitable access to environmental resources, benefits, and services to meet basic human needs and ensure human wellbeing, and makes provision for the implementation of special access measures for persons disadvantaged by unfair discrimination. Thirdly, section 2(4)(g) of NEMA states that decisions must consider the interests, needs, and values of all interested and affected parties, including the recognition of traditional knowledge. Finally, section 2(4)(h) of NEMA provides for the promotion of community wellbeing and empowerment through environmental education, the raising of environmental awareness, and the sharing of knowledge and experience. These provisions indicate that the cultural practices of customary communities ought not to be overlooked and instead, should be protected and promoted. Therefore, NEMA, as a framework of environmental legislation, must be used to guide the interpretation of the fortress-oriented provisions in NEMBA and other environmental legislation.

Within the context of the consumptive use of pangolin, the notion of ‘sustainable use’ is relevant. ‘Sustainable use’ is a well-used term with little in the way of supporting documentation. However, this concept is entrenched in section 24(b)(iii) of the Constitution.¹¹⁷ South African biodiversity legislation also recognises the sustainable use of indigenous biological resources.¹¹⁸ The Preamble to NEMBA stipulates that the Act provides for, *inter alia*, the sustainable use of indigenous biological resources. According to section 1 of NEMBA, ‘sustainable’ in relation to the use of biological resources, means the use of such resource in a manner and at a rate that: (a) would not lead to its long-term decline; (b) would not disrupt the ecological integrity of the ecosystem in which it occurs; and (c) would ensure its continued use to meet the needs and aspirations of present and future generations of people. Moreover, section 2(a)(ii) of NEMBA provides that one of the objectives of the Act is, *inter alia*, to provide for the use of indigenous biological resources in a sustainable manner.

‘Sustainable use’ was identified as one of the strategic goals of South Africa’s environmental policy in the White Paper on Environmental Management Policy (the White Paper).¹¹⁹ The White

117 Section 24(b)(iii) of the Constitution, (n 74), stipulates that the right to an environment includes, *inter alia*, environmental protection measures that secure ecologically sustainable development and use of natural resources. Moreover, the Preamble of NEMBA, (n 76) stipulates that the sustainable use of indigenous biological resources must be accommodated, whilst section 2(a)(ii) identifies one of the objectives of the Act as providing for the use of indigenous biological resources in a sustainable manner.

118 According to section 1 of NEMBA, (n 76), ‘indigenous biological resources’ are, *inter alia*, any living or dead animal, plant or other organism of an indigenous species; any derivative of such animal, plant or other organism; or any genetic material of such animal, plant or other organism.

119 Goal 2: Sustainable Resource Use and Impact Management in *White Paper on Environmental Management Policy* published in Government Gazette No. 18894 on 15 May 1998 (*White Paper on Environmental Management Policy*).

Paper stipulated that natural resources encompass ‘all forms of life’, including animals and thus, Temminck’s pangolin. The goal of sustainable resource use aims to, *inter alia*, promote equitable access to and sustainable use of natural and cultural resources.¹²⁰ Likewise, the IUCN recognises that wise and sustainable use of wildlife can be consistent with and contribute to conservation because the benefits derived from the use of species can incentivise communities to conserve them and their habitats.¹²¹

It has already been stipulated that where South Africa has ratified international agreements affecting biodiversity, these obligations ought to be fulfilled.¹²² Therefore, within the context of international law, the CBD, to which South Africa is a contracting party, is applicable. The concept of sustainable use is defined in Article 2 of the CBD, as:¹²³

... the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity and thereby maintain its potential to meet the needs and aspirations of present and future generations.

According to Article 6 of the CBD, South Africa must, *inter alia*, develop national strategies, plans, or programmes for the conservation and sustainable use of biological diversity.¹²⁴ Therefore, the notion of sustainable use illustrates that the sustainable use of pangolin may be consistent with and contribute to conservation, in addition to fulfilling the rights in section 24(b)(iii) of the Constitution and South Africa’s international obligations under the CBD.¹²⁵

The THPA, albeit indirectly related to the use of pangolin, may provide an avenue for customary use through the requirement of registration to practise as a traditional health practitioner.¹²⁶ According to section 21 of the THPA, no person may practise as a traditional health practitioner unless they are registered in terms of the Act.¹²⁷ Consequently, although NEMBA,¹²⁸ the ToPS Regulations,¹²⁹ and CITES envisage no use of pangolin by customary

120 *White Paper on Environmental Management Policy* (n 119).

121 IUCN SSC *Guiding Principles on Trophy Hunting as a Tool for Creating Conservation Incentives* (2012) at 2.

122 Section 5 of NEMBA, (n 76), pertains to the application of international agreements affecting biodiversity to which South Africa is a party and which bind the Republic.

123 CBD (n 78) Art 2.

124 Article 6 of the CBD, (n 78), pertains to the general measures for conservation and sustainable use.

125 IUCN SSC (n121) 2.

126 ‘Traditional health practitioner’, as defined in section 1 of the THPA, (n 79), means a person registered under the Act in one or more of the categories of traditional health practitioners.

127 Section 21 of the THPA (n 79), pertains to the application for registration to practise as a traditional health practitioner.

128 NEMBA (n 76) secs 3, 5, 56, 57, 87, 101 & 102.

129 ToPS Regulations (n 77) Regulations 122-123.

communities whatsoever, a person who is registered as a traditional health practitioner under the THPA could potentially rely on the custodianship-oriented provisions in NEMA to facilitate the customary use of pangolin.

Whilst conservation laws serve the legitimate purpose of conserving biological diversity within South Africa and notwithstanding the potential avenue for traditional health practitioners and the implications of sustainable use, these laws ultimately fail to recognise that many traditional South African communities are engaged in legitimate customary use of pangolin, which constitutes an integral part of their cultural beliefs.¹³⁰ This mandates a closer look into the effects of conservation laws on customary use and heritage value for customary communities.

3 Effects of the conservation laws on customary use and heritage value for customary communities

The intersection between conservation and cultural interests is at a contentious crossroads. On the one hand, the conservation laws reflect the historical juxtaposition of local people with conservation success and on the other hand, they present the need to adopt and implement rigorous measures aimed at protecting vulnerable species.¹³¹

In general, South Africa's conservation laws are fortress-oriented and protectionist as local people are excluded from the use and control of natural resources.¹³² Despite the provisions of NEMA and NEMBA that support a more inclusive, custodianship approach to conservation, the legislative framework as a whole has contributed to a conservation approach that elevates punishment over custodianship, even in instances of legitimate customary use.¹³³ This is indicative of the general failure of environmental governance in South Africa, particularly in the context of biodiversity conservation, to recognise the extant traditional practices of customary communities in relation to physical nature, which will be discussed below.¹³⁴

Many traditional South African communities are engaged in legitimate customary use of pangolin, which constitutes an integral

130 Baiyewu et al (n 6) 10.

131 Siurua (n 113) 87.

132 Abotsi, Galizzi & Herklotz (n 53) 397.

133 *Gongqose and Others v Minister of Agriculture, Forestry & Fisheries and Others; Gongqose and Others v State and Others* [2018] ZASCA 87, 01 June 2018 (*Gongqose*) paras 13-19.

134 Abotsi, Galizzi & Herklotz (n 53) 397.

part of cultural beliefs.¹³⁵ Consequently, to the extent that the conservation laws prevent the consumptive use of pangolin, the ancestral ties between customary communities and the natural environment are disrupted and ignored.¹³⁶

Arguably, the laws governing pangolin protection in South Africa operate to inhibit and undermine the customary use and value of pangolin insofar as there are currently no legally protected uses thereof. Therefore, if the prohibition on the consumptive use of pangolin is understood to be an absolute prohibition, these restrictions would apply to anyone wishing to exercise their customary rights. Consequently, the role of this prohibition in the dispossession of access to and use of pangolin for customary communities could also amount to the dispossession of cultural interests.¹³⁷

Although the laws governing pangolin protection in South Africa potentially undermine the heritage value for customary communities, it is argued that it is the poaching of pangolins for the international consumer markets of the illegal wildlife trade that ultimately poses the greatest threat to heritage value for customary communities. The illegal wildlife trade adversely impacts local communities who are affected by insecurity, regional instability, the depletion of livelihood and economic assets, and heavy-handed militarised responses to wildlife crimes.¹³⁸ Nevertheless, diminished population status may result in the eventual elimination of possessory interests and any legally protected uses of pangolin for customary communities.¹³⁹

Ultimately, the traditional practices of customary communities depict longstanding and deeply rooted ties to land and other natural resources.¹⁴⁰ Evidence suggests that the traditional practices of customary communities relating to pangolin extend further than the imperatives of subsistence and food security, into the realm of cultural identity and belief.¹⁴¹

In response to growing disenchantment with fortress conservation, many scholars have advocated for more participatory approaches to conservation.¹⁴² Consistent with this shift in the

135 Baiyewu et al (n 6) 12.

136 Abotsi, Galizzi & Herklotz (n 53) 398.

137 L Feris 'A customary right to fish when fish are sparse: Managing conflicting claims between customary rights and environmental rights' (2013) 16 *Potchefstroom Electronic Law Journal* at 557.

138 IUCN 'Communities and Illegal Wildlife Trade' <https://www.iucn.org/commissions/commission-environmental-economic-and-social-policy/our-work/specialist-group-sustainable-use-and-livelihoods-suli/communities-and-illegal-wildlife-trade> (accessed 28 January 2020).

139 Feris (n 137) 557.

140 As above.

141 As above.

142 Adams & Hulme (n 64) 193.

dominant conservation narrative, is the potential for the coexistence of the conservation laws and customary law, in relation to the exercise of a customary right of access to and use of pangolin, as will be discussed below.

4 Potential for the coexistence of the conservation laws and customary law

In this section, the potential for the coexistence of conservation laws and customary law will be considered against the backdrop of the rights to culture in sections 30 and 31 of the Constitution. I will then discuss how these rights were interpreted in *Gongqose* and attempt to apply the Court's reasoning to the exercise of a customary right of access to and use of pangolin.¹⁴³ Although the so-called living customary law pertaining to pangolin use in South Africa is difficult to ascertain due to abject literature,¹⁴⁴ I will rely on the findings of Baiyewu et al's recent ethnozoological survey to construct an argument in favour of adopting a custodianship approach to pangolin conservation.¹⁴⁵ Thereafter, I will reflect on the possibility and desirability of shifting from a fortress-oriented to a custodianship approach to pangolin conservation, by referring to the notion of intergenerational equity, as well as the African philosophical adage of *ubuntu ngumuntu ngabanye* as an ecophilosophy.

4.1 Reflecting on *Gongqose*

Section 211 of the Constitution provides for the judicial recognition of customary law rights.¹⁴⁶ Read together, sections 30 and 31 of the Constitution provide for the entrenchment of the rights to culture and cultural practices.¹⁴⁷ Notwithstanding textual recognition by the Constitution, some academics argue that customary law norms and practices still operate on the fringes of South African law.¹⁴⁸ However, recent judgments confirm that in South Africa's constitutional dispensation, customary law occupies equal footing with the common law and that the rights and cultural practices that

143 *Gongqose* (n 133).

144 D Ndirima 'The African law of the 21st century in South Africa' (2003) 36 *The Comparative and International Law Journal of Southern Africa* at 325.

145 A Wiersema 'Incomplete Bans and Uncertain Markets in Wildlife Trade' (2016) 12 *University of Pennsylvania Asian Law Review* at 84; Baiyewu et al (n 6) 2.

146 Section 211 of the Constitution, (n 74) recognises customary law and traditional leadership. Section 211(3) provides that the courts must apply customary law when applicable, subject only to the Constitution and any legislation that specifically addresses customary law.

147 Section 30 of the Constitution, (n 74), protects the right of everyone to use the language and to participate in the cultural life of their choice, whilst section 31 protects the rights of cultural, religious, and linguistic communities.

148 Monyamane & Bapela (n 114) 3.

underpin it now enjoy full legal protection.¹⁴⁹ For example, in *Bhe & Others v Khayelitsha Magistrate & Others*, the Court held that customary law is an independent norm within the legal system and is 'protected by and subject to the Constitution in its own right'.¹⁵⁰ Furthermore, in *Gongqose*, the Supreme Court of Appeal made the following remark about the fusion of customary law in South Africa's jurisprudence: '[t]his appeal brings customary law, which has not occupied its rightful place in this country, directly to the fore'.¹⁵¹

The history of South Africa is fraught with the dispossession of the land and livelihoods of customary communities.¹⁵² Of relevance to this discussion is the Court's articulation in *Alexkor Ltd and Another v Richtersveld Community (Richtersveld Community)*, on the relationship between customary law and natural resources.¹⁵³ In *Richtersveld Community*, the Court confirmed that customary law may operate as the basis for claims to natural resources and reiterated the importance of customary law as an integral part of South African law.¹⁵⁴

In *Gongqose*, two opposing legal interests were seemingly pitted against each other: the cultural practices and customary rights which stem from customary law; and the preservation or sustainability of the natural environment.¹⁵⁵ The appellants contended that their communities, collectively referred to as 'the Dwesa-Cwebe communities', had historically relied on forest and marine resources for their livelihoods.¹⁵⁶ For many decades, the Dwesa-Cwebe communities experienced the systematic obstruction of their access to forest and marine resources, revealing a long history of fortress-conservation.¹⁵⁷ Between 1900 and 1950, the Dwesa-Cwebe communities were forcibly removed from the area which is now known as the Dwesa-Cwebe Marine Protected Area (MPA) to give

149 *Monyamane & Bapela* (n 114) 6.

150 *Bhe & Others v Khayelitsha Magistrate & Others* 2005 1 BCLR 1 (CC) (*Bhe*) para 41.

151 *Gongqose* (n 133) para 1.

152 M Ramutsindela 'Land reform in South Africa's national parks: a catalyst for the human-nature nexus' (2003) 20 *Land Use Policy* at 42.

153 *Alexkor Ltd and Another v Richtersveld Community* 2004 (5) SA 460 (CC) (*Richtersveld Community*). In *Richtersveld Community*, a customary community instituted a successful land restoration claim. The Court held that the content of the land rights held by the Richtersveld community must be ascertained with reference to the traditional uses and the history of dispossession of the subject land. Evidence suggested that the community had a history of prospecting in minerals and that their conduct was consistent with ownership of the minerals being vested in them. The Court confirmed the right to exclusive occupation of the subject land, which included the right to use its water, its land for hunting and grazing, and to exploit its natural resources, including its mineral resources by the Richtersveld community.

154 *Richtersveld Community* (n 153) paras 51 & 64.

155 *Monyamane & Bapela* (n 114) 2.

156 *Gongqose* (n 133) para 4.

157 *Gongqose* (n 133) para 11.

priority access to prime land to white traders and farmers.¹⁵⁸ In 2000, a MPA was declared in terms of the Marine Living Resources Act 18 of 1998 (MLRA).¹⁵⁹ The MLRA, which has subsequently been amended by the National Environmental Management: Protected Areas Amendment Act 21 of 2014, provided for the conservation of marine ecosystems, the long-term sustainable use of marine living resources, and the orderly access to certain marine living resources.¹⁶⁰ Following the declaration of the MPA, the Dwesa-Cwebe communities were prohibited from fishing, save in accordance with certain provisions of the Transkei Nature Conservation Act 6 of 1971.¹⁶¹ However, despite this prohibition, the Dwesa-Cwebe communities continued to fish according to their customary practices, claiming that they were aligned, rather than at odds, with ecological sustainability.¹⁶²

A court has the power and the discretion to declare a traditional practice as law and in doing so, it must make a value judgment regarding the authenticity and persuasiveness of the evidence presented in support of the existence of such a custom.¹⁶³ In *Gongqose*, the appellants successfully proved the existence of a customary right of access to and use of marine and forest resources, in addition to an extant system of customary regulation governing all aspects of life in the Dwesa-Cwebe communities.¹⁶⁴ By adducing extensive evidence, the appellants demonstrated that the system of customary regulation in the Dwesa-Cwebe communities manifested ecological sustainability.¹⁶⁵ The following quote demonstrates the appellants' appreciation of the natural environment:¹⁶⁶

[T]hey understood that nature had a way of protecting itself and this is what regulated their harvesting; the tides and the weather did not allow them to go fishing every day; they also had their own way of making sure that there were enough fish for the generations to come, having been taught by their fathers and elders not to take juveniles and to put the small fish back. These rights were never unregulated and were always subject to some form of regulation either under customary or traditional practices.

One of the questions before the court in *Gongqose* was whether the MLRA had extinguished the appellants' customary rights.¹⁶⁷ The Court pronounced on the test for extinguishing customary law rights as follows: 'first, a customary right can only be extinguished by legislation specifically dealing with customary law; and secondly, that

158 As above.

159 *Gongqose* (n 133) para 2.

160 Marine Living Resources Act 57 of 2003, Long title.

161 *Gongqose* (n 133) para 4.

162 *Gongqose* (n 133) para 13.

163 Feris (n 137) 565.

164 *Gongqose* (n 133) para 31.

165 *Gongqose* (n 133) para 56.

166 *Gongqose* (n 133) para 39.

167 *Gongqose* (n 133) para 21.

such legislation must do so either expressly or by necessary implication'.¹⁶⁸ The Court held that nothing in the language of the MLRA specifically addressed customary rights.¹⁶⁹ Furthermore, the Court held that the rights and practices of the Dwesa-Cwebe communities were in existence long before the MLRA came into force and were subject to significant regulation by customary law.¹⁷⁰ Ultimately, the Supreme Court of Appeal allowed the exercise of a customary right of access to and use of marine resources to coexist alongside the conservation protection afforded under the MLRA.¹⁷¹ Moreover, the Supreme Court of Appeal rejected the High Court's reasoning that elevating the rights to culture in sections 30 and 31 of the Constitution would occur at the expense of the right to an environment.¹⁷² Instead, the Supreme Court of Appeal held that the recognition of the customary rights of the Dwesa-Cwebe communities could be reinforcing, rather than destructive, of the environmental right.¹⁷³ Writing for the majority, Schippers AJA confirmed that: '... the customary law of the Dwesa-Cwebe communities provides for sustainable conservation and utilisation of resources ...'.¹⁷⁴

What is clear from *Gongqose* is that customary rights and conservation can coexist, provided that customary use has not been extinguished by conservation law and provided further that the customary use pursues ecological sustainability.¹⁷⁵ In *Gongqose*, the Supreme Court of Appeal indicated that customary law may give rise to rights, such as access and use rights to resources.¹⁷⁶ This raises the discussion on whether customary law rights of access to and use of pangolin can coexist with conservation laws by reflecting on the approach adopted by the Supreme Court of Appeal in *Gongqose*, where custodianship was elevated over punishment.

4.2 The possibility for the coexistence of the conservation laws regulating pangolin and a customary right of access to and use of pangolin

Based on the *Gongqose*-reasoning, the exercise of a customary right of access to and use of pangolin is dependent on several factors, including: (1) the existence of a customary right, including the presence of a system of customary regulation governing the consumptive use of pangolin; and (2) the survival of existing

168 *Gongqose* (n 133) para 50.

169 *Gongqose* (n 133) para 52.

170 *Gongqose* (n 133) para 56.

171 *Gongqose* (n 133) para 65.

172 *Gongqose* (n 133) para 66.

173 *Gongqose* (n 133) para 56.

174 As above.

175 *Gongqose* (n 133) paras 39, 56 & 59.

176 *Gongqose* (n 133) para 25.

customary rights following the enactment of the conservation laws regulating pangolin in South Africa.¹⁷⁷

4.2.1 *The existence of a customary right – including the presence of a system of customary regulation*

The existence of a customary right of access to and use of pangolin depends on: (1) whether customary law gives rise to such rights; (2) whether those communities who may assert the existence of a customary right of access to and use of pangolin are governed by a system of customary regulation that ensures sustainable use; and (3) whether customary rights have been extinguished by the conservation laws (which will be discussed below).¹⁷⁸ Points (1) and (2) raise factual questions that cannot be answered in abstract. However, for purposes of this discussion, the similarities and differences that exist between the access to and use of marine resources in *Gongqose* and the traditional practices of customary communities relating to pangolin will be considered in an attempt to provide a framework for future comparison. In referring to the communities who may assert the existence of a customary right of access to and use of pangolin, I will collectively refer to the participating communities in Baiyewu et al's ethnozoological survey – namely, the Sepedi, isiZulu, Tsonga, Tswana, Venda, Ndebele and Swati communities – as the customary communities.¹⁷⁹

There are notable similarities in cultural significance amongst the Dwesa-Cwebe communities in *Gongqose* and the traditional practices of customary communities relating to pangolin. In *Gongqose*, the Dwesa-Cwebe communities established that their customary rights were not confined to consumption, but were exercised for purposes of customary rites, rituals, ancestral ceremonies, and adornment.¹⁸⁰ Similarly, although pangolins are sourced as bushmeat, Baiyewu et al illustrate that pangolins are also highly sought after and used regularly in traditional medicine and divination in South Africa.¹⁸¹ Therefore, like the Dwesa-Cwebe communities, the traditional practices of customary communities relating to pangolin transcend the imperatives of food security and subsistence, into the realm of cultural identity and belief.¹⁸²

Notwithstanding the similarities in cultural significance, several important differences also exist. Firstly, unlike the Dwesa-Cwebe communities, the customary communities in Baiyewu et al's survey do

177 *Gongqose* (n 133) paras 31, 39 & 57.

178 *Richtersveld Community* (n <XREF>) para 62.

179 Baiyewu et al (n 6) 5.

180 Baiyewu et al (n 6) 5; *Gongqose* (n 133) para 53.

181 Baiyewu et al (n 6) 12.

182 Feris (n 137) 557.

not rely on pangolins for their livelihoods.¹⁸³ Secondly, in *Gongqose*, the appellants successfully adduced extensive evidence regarding the nature of a living customary law system governing all aspects of life, including a venerable tradition of sustainably utilising marine and terrestrial natural resources.¹⁸⁴ Therefore, owing to the wide geographic distribution of pangolins across South Africa, and unlike the localised access to and use of forest and marine resources in *Gongqose*, the task of ascertaining the living customary law for a specific customary community could be problematic.¹⁸⁵ As Ndimba argues, the meaning of customary law is heavily dependent on its context.¹⁸⁶ Therefore, the traditions, norms, and practices underpinning the customary law of the individual customary communities cannot be divorced from the social realities in which each of them operates.¹⁸⁷ The implications of this fusion between customary law and social reality are that the exercise of a customary right of access to and use of pangolin in one participating community might be different when compared to the social reality of another participating community.¹⁸⁸

Therefore, the potential for the coexistence of conservation and customary law in relation to pangolin depends on the existence of a customary right of access to and use of pangolin, in addition to an extant system of customary regulation that pursues ecological sustainability. However, based on the *Gongqose*-reasoning, it is also important to consider the survival of existing customary rights, following the enactment of the conservation laws regulating pangolin in South Africa, which is discussed below.

4.2.2 *The survival of existing customary rights following the enactment of the conservation laws regulating pangolin in South Africa*

The survival of existing customary rights following the enactment of the conservation laws depends on the existence of a customary right,

183 D Soewu et al 'Bushmeat and beyond: historic and contemporary use in Africa' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 251. Evidently, pangolins are consumed much less frequently in Southern Africa than in West and Central Africa. Although farm workers in South Africa are recorded to have eaten pangolins found as roadkill or those that have been electrocuted, there is little evidence to suggest that people actively source them for food.

184 *Gongqose* (n 133) paras 37 & 39.

185 F Osman 'The ascertainment of living customary law: an analysis of the South African Constitutional Court's jurisprudence' (2019) 51 *The Journal of Legal Pluralism and Unofficial Law* at 101.

186 Ndimba (n 144) 328.

187 Ndimba (n 144) 326.

188 Baiyewu et al's (n 6). The survey illustrates that pangolin, although revered by all participating communities, are utilised for vastly different purposes at differing frequencies of use.

including the presence of a system of customary regulation which, as indicated above, cannot be answered in abstract. However, what is clear is that the practices of customary communities in relation to pangolin would only be protected on the *Gongqose* reasoning to the extent that they are not specifically regulated (and thus, extinguished) by the conservation laws.

A central feature of the Supreme Court of Appeal's discussion in *Gongqose* on whether the MLRA extinguished the appellant's customary rights, was how the Dwesa-Cwebe communities' customs recognised the importance of ecological sustainability.¹⁸⁹ The question arises whether the customary laws in relation to pangolin are aimed at ecological sustainability. Although Baiyewu et al's survey concludes that the customary communities use the animal parts sustainably because they are aware of the protected status of pangolins in their provinces,¹⁹⁰ there is no quantitative research, peer-reviewed literature, or judicial precedent to suggest that customary communities hold comparable internal sustainability measures in respect of pangolins.¹⁹¹ In the absence of demonstrable sustainability measures, it is unlikely that a court would uphold such a customary right because the rights to culture and cultural practices cannot be exercised in a manner that is inconsistent with other rights, such as the right to an environment, as enshrined in section 24 of the Constitution.¹⁹²

Although coexistence may be possible, the question of desirability brings overarching conservation objectives and ethical considerations to the fore. Considering the scale of the transnational illegal wildlife trade, how could regulations pertaining to access and use of pangolin ensure that wildlife trafficking does not masquerade for legitimate domestic utilisation? Although the answer to this question falls outside the scope of my research, it is central to the practical realisation of a customary right of access to and use of pangolin by customary communities.

Owing to the nature of customary law, the rights embodied therein do not easily translate into a law that is foreign to it.¹⁹³ Consequently, to provide proper recognition to the customary rights of communities in South Africa, there ought to be a shift in the legal and environmental governance landscape – one that the Supreme Court of Appeal in *Gongqose* nudged us more closely towards. This shift may be achieved through decolonising the existing environmental law and reassessing the relationship between humans and nature.

189 *Gongqose* (n 133) para 56.

190 Baiyewu et al (n 6) 16.

191 Pietersen et al (n 48) 190.

192 *Gongqose* (n 133) para 66.

193 Ndima (n 144) 327.

5 Intergenerational equity and ubuntu: Foundations for the coexistence of the conservation laws regulating and the exercise of a customary right of access to and use of pangolin

The principle of intergenerational equity refers to the notion of fairness or justice between generations and is widely accepted as a constituent part of the wider concept of justice.¹⁹⁴ Intergenerational equity is premised on the idea that a collective commitment to the future helps communities to address present-day issues.¹⁹⁵ Section 24(b) of the Constitution is premised on the notion of intergenerational equity and recognises an express entitlement to have the environment, including pangolin, protected for the benefit of present and future generations.¹⁹⁶ This section protects the right to an environment through reasonable and other legislative measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.¹⁹⁷

It is contended that the principle of intergenerational equity is a site for legislative reform insofar as it protects the legitimate customary interests of access to and use of pangolins against the threat posed by the exploitation and diminished population status thereof.¹⁹⁸ What is clear is that the overuse of pangolins (for any purpose) will result in a diminished population status, which in turn, will result in the diminution (or potential elimination) of cultural interests and practices in relation to pangolins for present and future customary communities. Therefore, the ability of communities to work collectively and in a self-regulating manner is crucial for the long-term sustainability of pangolins and to avoiding a 'tragedy of the commons' situation.¹⁹⁹

194 K Bosselmann 'Strong and Weak Sustainable Development: Making Differences in the Design of the Law' (2006) 13 *South African Journal of Environmental Law and Policy* at 40.

195 E Weiss 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 *Ecology Law Quarterly* at 501.

196 Bilchitz (n 81) 447.

197 Constitution (n 74) sec 24(b).

198 Abotsi, Galizzi & Herklotz (n 53) 38.

199 The tragedy of the commons illustrates the conflict between individual and collective rationality in relation to the continued use of shared resources, and denotes the chronic inability of humankind to sustain resources. See G Hardin 'The Tragedy of the Commons' (1968) 162 *Science* at 1244; and E Ostrom *Governing the Commons* (1990) at 90.

In terms of ubuntu as an ecophilosophy, what is clear is that humanness is an expression of the interconnectedness amongst people and the natural world.²⁰⁰ Humanness finds expression in a communal context rather than the individualism prevalent in many Western societies.²⁰¹ According to Le Grange, the sense of wholeness and interconnectedness of self with the social and natural worlds implies that caring for others also involves a duty of care for nature.²⁰² Therefore, harnessing ubuntu as an ecophilosophy can add value to existing approaches to addressing environmental issues and can potentially contribute to greater environmental consciousness on the part of South Africans.²⁰³

Ubuntu, as an ecophilosophy, provides a compelling argument for the coexistence of conservation laws and customary law. Considering that recent seizures data suggests that the number of pangolins in the illegal wildlife trade is increasing, the effectiveness of the contemporary fortress-oriented approach to pangolin conservation is questionable.²⁰⁴ Some scholars argue that the traditional practices executed by customary communities that manifest sustainability reveal a host of approaches to protecting the natural world and securing the sustainable utilisation of natural resources.²⁰⁵ Additionally, there is growing international support for tearing down the walls of fortress conservation and having greater regard for the rights and interests of local people.²⁰⁶ A more custodianship approach to pangolin conservation, through ubuntu as an ecophilosophy, could enable better protection for pangolins in South Africa. In addition to the high conservation value and intrinsic value of pangolins in general, the cultural magnitude of the animal for customary communities in South Africa indicates that they too have a great interest in ensuring the survival of the species.

In returning to the *Gongqose*-reasoning, the Supreme Court of Appeal, albeit implicitly, endorsed a custodianship approach to conservation through ubuntu as an ecophilosophy. However, it is submitted that the Court in *Gongqose* did not go far enough in emphasising the strengths of ubuntu as an ecophilosophy. Furthermore, the Court overlooked the potential for ubuntu to harness greater environmental consciousness, in the wake of a neo-liberal capitalist propensity, towards the commodification of nature.

200 Le Grange (n 66) 63.

201 Le Grange (n 66) 66.

202 Le Grange (n 66) 63.

203 Le Grange (n 66) 63 & 64.

204 Ullmann, Verissimo & Challender (n 14).

205 Harrop (n 9) 284.

206 I Betokko & S Carvalho 'To protect nature, bring down the walls of fortress conservation' 12 October 2020 <https://www.aljazeera.com/opinions/2020/10/12/to-protect-nature-bring-down-the-walls-of-fortress-conservation/> (accessed 16 October 2020).

6 Conclusion and recommendations

In this paper, some of the prevailing complexities between the conservation laws and the African customary use of pangolin were assessed. It was argued that the conservation laws impose limitations on customary use insofar as there are currently no legally protected uses of pangolin. The existing legislative framework undermines the heritage value of pangolins for customary communities in that punishment is elevated over custodianship, even in instances of legitimate (and sustainable) customary use. This is illustrated by the fact that NEMBA fails to provide for a permit system for the performance of restricted activities or any other avenue for the exercise of customary rights in relation to pangolin and thus, excludes customary use entirely.

On the face of it, the simultaneous practical realisation of pangolin protection on the one hand and customary use of pangolin on the other, are at odds. However, the coexistence of conservation laws and customary use of pangolin may be achieved through the promotion of ubuntu as an ecophilosophy and the constitutionally enshrined principle of intergenerational equity.²⁰⁷ The conservation laws regulating pangolin should seek to incorporate custodianship approaches to pangolin conservation, as opposed to the prevailing fortress-oriented and protectionist legislative approach. I assert that the possibility of coexistence ought to be more closely considered to afford practice under customary law its rightful place in South Africa's constitutional dispensation. The Supreme Court of Appeal in *Gongqose* nudged the legal and environmental governance landscape closer towards harmonisation and revealed the possibility for coexistence between conservation law and customary law.

It is contended that Parliament ought to expressly regulate the customary use of pangolins in South Africa. By casting local people as custodians, rather than the principal threats to pangolins, legislative reform ought to provide for a permit system for the performance of restricted activities in terms of NEMBA, as well as a prospective quota system for the small-scale use of pangolins by registered traditional health practitioners. Although the risks associated with legalising the use of an endangered species are acknowledged together with the potential for 'opening the floodgates' to illicit activities that masquerade as legitimate customary use, it is necessary to consider affording the rights of access to and use of pangolins to customary communities to recognise and fulfil the equal status of customary law within the realm of environmental law and governance, as envisaged by the Constitution.

207 Le Grange (n 66) 65.