

Constitutional Foundations of Environmental Law: From Global Norms to Local Judgments

Notes by Boyane Tshehla

1. International Treaties and Environmental Law

International environmental law begins with a network of multilateral treaties that provide universal principles. Notable examples include:

- The Stockholm Declaration (1972) – First global recognition of the human right to a healthy environment.
- The Rio Declaration (1992) – Introduced principles like sustainable development, the precautionary principle, and public participation.
- The Paris Agreement (2015) – Emphasizes climate action within a human rights and equity framework.

These treaties inform constitutional rights globally and influence the drafting and interpretation of national constitutions — including South Africa's.

2. The African Charter on Human and Peoples' Rights (ACHPR)

The African Charter (1981) is one of the few regional human rights instruments to explicitly include environmental rights:

- Article 24: “All peoples shall have the right to a general satisfactory environment favourable to their development.”

This right has been interpreted robustly by the African Commission on Human and Peoples' Rights — most notably in:

The *SERAC Case* (2001) – *Social and Economic Rights Action Center & Another v Nigeria*

- The Nigerian government failed to regulate oil companies that polluted the Niger Delta.
- The Commission found violations of rights to health, life, and the environment.
- Key point: Environmental degradation can amount to a human rights violation under African law.

The Ogiek Case (2017) – African Commission v Kenya

- The Kenyan government evicted the Ogiek people from the Mau Forest.
 - The African Court found violations of the rights to land, culture, and environment.
 - Key point: Environmental rights protect not just ecosystems but also cultural and customary ways of life.
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3. Constitutional Environmental Rights Across Africa

Several African countries have constitutional provisions explicitly recognising the right to a healthy environment:

- Namibia – Article 95(l) of the Constitution mandates environmental protection and sustainable use of natural resources.
- Lesotho – Section 36 of the Constitution provides for environmental protection as a principle of state policy.
- Mozambique – Article 90 of the 2004 Constitution states: “All citizens shall have the right to live in a balanced environment and the duty to defend it.”
- Kenya – Article 42 guarantees the right to a clean and healthy environment; Article 69 imposes duties on the state to protect biodiversity.
- Eswatini (Swaziland) – Section 210(2) of the Constitution enshrines principles for environmental protection and sustainable use.
- Zimbabwe – Section 73 of the 2013 Constitution gives everyone the right “to an environment that is not harmful to their health or well-being.”

These provisions reflect a continental shift towards environmental constitutionalism — linking development, equity, and ecological stewardship.

4. Section 24 of the South African Constitution

South Africa's Constitution (1996) enshrines environmental rights in Section 24:

"Everyone has the right —

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures..."

Key principles embedded here include:

- Human-centred environmental protection
 - Intergenerational justice
 - Legislative accountability (via NEMA and other statutes)
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5. Landmark South African Cases Interpreting Section 24

Fuel Retailers Association v Director-General Environmental Affairs (2007)

- The Constitutional Court held that environmental protection must be considered independently in decision-making.
- Development cannot override environmental interests without proper assessment.
- Key impact: Section 24 creates substantive duties, not just procedural ones.

Earthlife Africa Johannesburg v Minister of Environmental Affairs (2017)

- Challenged the approval of a coal-fired power station without climate change assessment.
- Court held that climate impacts must be considered under NEMA.
- Key impact: Introduced climate change into South African environmental jurisprudence.

Gongqose and Others v Minister of Agriculture, Forestry and Fisheries (2018)

- Fishers were convicted for harvesting marine resources in a protected area without permits.
- The Supreme Court of Appeal overturned the convictions, holding that their customary rights to fish were protected under the Constitution.
- Key impact: Customary law can coexist with environmental law, and Section 24 must be interpreted in harmony with customary rights.

Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others (2022)

- Challenged the approval granted to Shell for seismic surveys off the Eastern Cape coast.
 - The High Court found that the decision violated environmental rights, traditional community consultation duties, and cultural rights under the Constitution.
 - Key impact: Affirmed the interconnectedness of environmental, cultural, and participatory rights under Section 24.
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6. Synthesis: A Constitutional Model of Environmental Law

South Africa's environmental law rests on a constitutional foundation that integrates:

- Global norms (through treaties)
- Regional obligations (ACHPR)
- Domestic guarantees (Section 24 of the Constitution)
- Judicial enforcement (key judgments)
- Customary recognition (as shown in *Gongqose*)
- African peer practice (as seen in Namibia, Kenya, Mozambique, etc.)

This model empowers courts, communities, and citizens to demand accountability, protection, and sustainable development — all grounded in law.