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ARTICLE

Constructive Trusts and Intergenerational Equity in Human Rights Law: Beyond the Public Trust Doctrine

John F Manderscheid

PhD Student, School of Law, Trinity College Dublin, Dublin, Ireland
Email: mandersj@tcd.ie

Abstract

Human rights litigation increasingly confronts claims that environmental degradation violates duties owed to future generations, yet existing doctrinal frameworks struggle to give these intergenerational obligations concrete effect. This article argues that the constructive trust offers a more coherent and workable private-law architecture for intergenerational equity than the public trust doctrine that dominates current scholarship and climate litigation strategies. The article traces the intellectual genealogy of intergenerational obligation in ideas of stewardship, usufruct and equity, and shows how these motifs have been channelled into trust-based vocabularies. Following this, it surveys international and domestic case law in which courts acknowledge temporal dimensions of environmental harm but hesitate to constitutionalise a general public trust, and highlights four structural defects that render public trust theory jurisdictionally fragile and remedially weak. The latter portion of the article develops an account of constructive trust reasoning grounded in unjust enrichment and unconscionable retention of benefits and shows how this framework can be used to attach proprietary consequences to profits generated by rights-violating environmental conduct, without requiring recognition of future generations as current rights-holders. The article concludes that constructive trust logic is transferable across legal systems, because it aligns with civil-law regimes of unjust enrichment, patrimonies by appropriation and constitutional environmental rights provisions. It further contends that an intergenerational constructive-trust approach can supply some of the 'missing architecture' of intergenerational justice within contemporary human rights law.

Keywords: human rights; environmental law; equity; trusts; unjust enrichment; international human rights law; intergenerational equity

1. Introduction

Human rights law is understood as a system of norms designed to protect individuals and groups who are particularly vulnerable. Within this architecture, future generations constitute a uniquely disadvantaged category: although not yet in existence, they are likely to bear the consequences of current decisions affecting environmental quality and

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economic stability. These harms raise the question of whether present generations owe legally cognisable duties to safeguard conditions for enjoyment of fundamental rights by future persons.

This inquiry has been framed most prominently by Edith Brown Weiss, who conceptualises such obligations under the term 'intergenerational equity', arguing that each generation holds the natural and cultural environment in trust for its successors.[1] Lydia Slobodian similarly describes intergenerational equity as fairness in access to, and use of, planetary resources across time, emphasising both relationships among generations and between human communities and the natural systems on which they depend.[2] These formulations point to a structural affinity with human rights law, which recognises duties to prevent serious foreseeable harm and to provide effective remedies where rights are violated.[3]

Intergenerational equity has been invoked in environmental and climate-related litigation as a framework for articulating the interests of persons not yet born.[4] Courts and claimants have relied on the concept to argue that environmental degradation engages obligations owed by the present generation to future ones. Cases such as *Oposa v Factoran*[5] (Philippines), *Future Generations v Ministry of the Environment and Others (Minambiente)*[6] (Colombia) and *Neubauer v Germany*[7] have addressed whether contemporary regulatory choices unduly shift environmental burdens to future generations, often in ways that threaten rights to life, health, private and family life and cultural integrity. Applicants contend that failing to mitigate environmental harm threatens the ability of future persons to enjoy a habitable environment, raising questions about the recognition and justiciability of intergenerational claims within human rights frameworks.

The principle reflects the claim that present generations bear obligations toward both past and future persons in relation to the conditions necessary for the enjoyment of fundamental rights. Despite emerging international and domestic cases engaging with the long-term effects of present actions on future rights-holders, analysis of intergenerational equity as a justiciable human rights doctrine remains underdeveloped.[8] This gap is

[1] EB Weiss, 'Intergenerational Equity: A Legal Framework for Global Environmental Change' in EB Weiss (ed), *Environmental Change and International Law: New Challenges and Dimensions* (UN University Press 1992) 6.

[2] L Slobodian, 'Defending the Future: Intergenerational Equity in Climate Litigation' (2020) 32 GeoIntlEnvtlLRev 569, 571.

[3] V Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' (2020) 33 LJIL 601, 606; D Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 7, 16.

[4] A Daly, 'Intergenerational Rights Are Children's Rights: Upholding the Right to a Healthy Environment through the UNCRC' (2023) 41 NQHR 132, 154, where the author analyses recent climate cases involving present day children and youth 'and the fact that few rely on the UN Convention on the Rights of the Child (CRC)'.

[5] *Oposa v Factoran* (1993) 224 SCRA 792 (Supreme Court of the Philippines).

[6] *Generaciones Futuras v Minambiente* STC 4360-2018 (5 April 2018) para 20 (Supreme Court of Colombia).

[7] *Neubauer v Germany*, Bundesverfassungsgericht, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 (German Federal Constitutional Court).

[8] S Humphreys, 'Against Future Generations' (2022) 33 EJIL 1061, 1063, where he concludes that 'the appeal to future generations obfuscate, rendering a series of critical boundaries diffuse, and, in doing so,

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particularly salient where claims of environmental harm or generational disadvantage require an account of how one generation bears responsibility for burdens imposed on another; this article asks which legal forms can render such duties justiciable and remedially meaningful.

Weiss conceives of intergenerational equity as a relationship between the living generation and a future generation that does not yet possess legal personality. She acknowledges that human rights are conventionally grounded in the rights of identifiable individuals and that future persons lack standing to advance claims, which raises questions of justiciability.[9] Burns Weston similarly observes that human rights obligations presuppose a reciprocity that unborn individuals cannot fulfil, rendering it uncertain to what extent duties toward future generations can be accommodated within prevailing doctrine.[10] These conceptual challenges necessitate a clearer account of how intergenerational responsibilities might be recognised and, crucially, of which doctrinal vehicles are best suited to translate them into enforceable obligations and remedies.

The predominant vehicle for expressing these obligations has been the public trust doctrine. Public trust arguments cast the State as trustee of environmental resources for the people and for future generations.[11] Yet, as emerging climate jurisprudence illustrates, the public trust is doctrinally fragile and structurally ill-suited to the demands of a rights-based framework: it is unevenly recognised across jurisdictions, rarely produces robust proprietary or gain-based remedies and does not operate as a trust in the orthodox equitable sense.[12] This article argues that intergenerational claims require a different legal architecture. It contends that the constructive trust, grounded in unjust enrichment and unconscionable retention of benefits, provides a coherent and adaptable mechanism for converting intergenerational environmental harms into enforceable obligations attached to specific assets.

The argument proceeds in four stages. Section 2 traces the historical development of intergenerational thinking within legal traditions and identifies the stewardship and equity motifs that underpin debates. Section 3 examines contemporary theoretical approaches, focusing on Rawls and Weiss' trust-based and broader equitable conceptions of intergenerational fairness. Section 4 reviews international declarations, reports and jurisprudence in which courts have been asked to consider the long-term effects of present actions on future rights-holders and evaluates the public trust doctrine as the vehicle for intergenerational claims in environmental litigation, highlighting its doctrinal

abjures concrete urgent existing responsibilities towards those alive today in the same gesture that nominally assumes them for an abstract unformed future'. cf M Wewerinke-Singh, A Garg and S Agarwalla, 'In defence of Future Generations: A Reply to Stephen Humphreys' (2023) 34 EJIL 651, where the authors challenge Humphreys' 'dismissal of future generations as a locus of responsibility for present generations'.

[9] EB Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 AJIL 198, 205.

[10] BH Weston, 'The Theoretical Foundations of Intergenerational Ecological Justice: An Overview' (2012) 34 HRQ 251, 261–62.

[11] JL Huffman, 'Speaking of Inconvenient Truths: A History of the Public Trust Doctrine' (2007) 18 DukeEnvtlL&PolyF 1.

[12] *La Rose v Canada* [2023] FCA 241, para 62; *Juliana v United States*, No 6:15-cv-01517-TC (D Or, 17 January 2020) 11, 32; Huffman (n 11).

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and remedial limitations. Section 5 advances the central argument of this article: that the constructive trust, particularly through its focus on unjust enrichment and unconscionable retention of benefits, offers a more coherent, transferable mechanism than the public trust for articulating and enforcing legally cognisable obligations across generations within a human rights framework. The conclusion reflects on the implications of this argument for the future development of intergenerational equity as an emerging principle of human rights law.

2. Historical development of intergenerational equity

Although associated with environmental and human rights debates, concerns about intergenerational obligations have a longer lineage. This section offers an overview of the perspectives that inform the conception of intergenerational equity and prefigure the trust- and equity-based structures developed later in the article. It begins with classical and theological notions of stewardship and transmitted burden; turns to medieval and early modern discussions of succession, property and collective obligation; and concludes with their reformulation in the Anglo-American tradition. The aim is to identify recurring motifs, such as dominion tempered by restraint, equity as a corrective to strict right and the idea of society as a transgenerational partnership, that underpin both public trust rhetoric and constructive trust reasoning.

2.1. Theological and classical antecedents: dominion, stewardship and equity

Discussions about obligations across generations have long been connected to questions concerning the extent of human responsibility for the natural and social world. Within the Western intellectual tradition, one influential strand derives from interpretations of Judaeo-Christian scriptures, which contain both anthropocentric and stewardship-oriented depictions of humanity's relationship to the environment. In Genesis, humanity is instructed to 'be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth', a passage often cited to support an expansive conception of dominion.[13] At the same time, Genesis also limits human authority in the prohibition concerning the Tree of Knowledge, and theological commentary treated such limits as imposing responsibilities regarding the use and preservation of creation. The narrative of 'original sin' has been used to illustrate early conceptions of burdens transmitted across time.[14] These texts articulate two themes that recur in later legal doctrine: that power over resources is conceptually distinct from absolute ownership; and that wrongful acts or excessive use by one generation may impose lasting burdens on those who follow. Both themes reappear, in secular form, in modern attempts to cast present generations as trustees or constructive trustees of 'inheritance'.

In classical legal philosophy, the concept of equity was developed most fully by Aristotle, who conceived *epieikeia* as a corrective to the rigidity of formal legal rules.[15]

[13] *King James Bible* (OUP 1997) Gen 1:28.

[14] P Brown, *Through the Eye of a Needle: Wealth, the Fall of Rome, and the Making of Christianity* (Princeton University Press 2012) 178–79.

[15] Aristotle, *Nicomachean Ethics* (R Crisp tr, CUP 2000) 99.

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Although not directed toward future generations in a modern sense, his discussions of moderation and restraint have been interpreted as anticipating later ideas about responsible resource use. Drawing on Plato's Laws, Aristotle suggested that a just person may be 'satisfied with less than [their share] even though [they have] the law on [their] side', indicating that the equitable exercise of legal rights may require forgoing the full extent of one's entitlements.[16] This emphasis on voluntarily foregoing lawful but excessive gain for the sake of the community foreshadows the later use of equity, culminating in the constructive trust, to police the retention of benefits where strict legal rights would otherwise permit harmful outcomes.

2.2. Roman and medieval traditions: patrimony, res communes and stewardship

Scholars such as Benke and Meissel note that the *prodigus* provisions, which restricted the capacity of spendthrifts, were designed to prevent the dissipation of family property and safeguard the economic interests of heirs.[17] Roman public law's treatment of certain resources as *res communes*, held in common for public use, has likewise been read as a precursor to modern public trust ideas, even if it did not develop a fully-fledged fiduciary framework.[18] Charles J Reid observes that medieval discussions of natural rights drew upon both biblical and Greco-Roman sources, refining concepts that later informed Western legal thought about inheritance, stewardship and the transmission of obligations across time.[19] Thomas Aquinas played a central role in this synthesis. In his treatment of natural rights and familial duties, Aquinas emphasised the responsibility of the paterfamilias to preserve resources for his descendants, describing this obligation as 'quod est thesaurize'.[20] Reid notes that *thesaurizare* means 'to build up treasure', capturing the expectation that parents would limit present consumption to secure the welfare of future heirs.[21] These Roman and medieval materials provide an early jurisprudential vocabulary: patrimony, common things and stewardship, which modern law reworks in terms of trusteeship and equitable constraints on ownership.

2.3. Early modern thought: non-waste, social contract and transgenerational compacts

In the early modern period, questions of intergenerational responsibility reappeared within broader debates on natural rights, property and political authority. Locke's writings are frequently cited as anticipating formulations of intergenerational obligations.[22] Weiss, for

[16] ibid 101.

[17] N Benke and FS Meissel, *Übungsbuch Römisches Sachenrecht* (Manz 2008); cf JM Puaschunder, *Intergenerational Equity: Corporate and Financial Leadership* (Edward Elgar 2019).

[18] Justinian, *The Institutes of Justinian* (T Sandars tr, Lawbook Exchange 2007); cf BW Frier, 'The Roman Origins of the Public Trust Doctrine' (2019) 32 Journal of Roman Archaeology 641, paras 1.2.1, 2.1.1.

[19] CJ Reid Jr, 'The Jurisprudence of the Forced Share: The High and Late Middle Ages' in H Vogt, HM Singh and OA Rønning (eds), *Donations, Inheritance and Property in the Nordic and Western World from Late Antiquity until Today* (Taylor & Francis 2017) 72.

[20] ibid.

[21] ibid.

[22] Weiss (n 1) 9, referring to J Locke, 'An Essay Concerning the True Original, Extent and End of Civil Government' in E Barker (ed), *Social Contract* (OUP 1962) 3, paras 25, 31, 33, 37.

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example, draws attention to Locke's assertion that a person 'has an obligation not to take more fruits of nature than he can use, so that they do not spoil and become unavailable to someone else for use – i.e., an obligation not to waste the fruit of nature'.[23]

Debates surrounding the French Revolution developed these themes, particularly in the contrasting positions advanced by Edmund Burke and Thomas Paine. Both exerted influence on Anglo-American constitutional and political thought and, indirectly, on later legal accounts of intergenerational duty. Burke famously described society as a contract 'between those who are living, those who are dead, and those who are to be born', insisting that the living are 'life-renters' who must not waste the inherited 'fabric of society', and treating obligations to past and future generations as integral to constitutional order and legitimate institutional change.[24]

Paine, by contrast, rejected the authority of the dead over the living, arguing that each generation is entitled to remake its political institutions, a tension that foreshadows contemporary debates about democratic self-determination and long-term environmental commitments.[25] By insisting that each generation retains the right to reconfigure its institutions, he highlighted the democratic objection that any strong intergenerational obligation may unduly constrain the political self-determination of those currently alive. Modern courts confronting climate and environmental litigation frequently navigate this same tension, balancing claims framed in the language of intergenerational equity against concerns about institutional competence and democratic legitimacy.

2.4. Anglo-American reformulations: usufruct, inheritance and ideological appropriations

In the Anglo-American tradition, intergenerational concerns were articulated in differing ways by Thomas Jefferson and Abraham Lincoln. Jefferson wrote that 'the earth belongs in usufruct to the living: that the dead have neither powers nor rights over it', employing a civil-law concept to argue that each generation enjoys a temporary, non-absolute interest in the resources it inherits.[26] The idea of usufruct, use without destructive depletion, reinforced Jefferson's view that no generation may irrevocably bind its successors through excessive consumption or accumulated debt.

Lincoln, writing in a different political moment, drew more explicitly on Burkean themes of inherited constitutional responsibility.[27] In the *Lyceum Address* he described Americans as 'legal inheritors' of institutions constructed by earlier generations and emphasised that the task of the living was 'to transmit these … unprofaned … to the latest generation'.[28] Read together, Jefferson and Lincoln illustrate two enduring strands

[23] ibid.

[24] E Burke, *Reflections on the Revolution in France* (Dolphin 1961) 110.

[25] T Paine, *Rights of Man: Being an Answer to Mr Burke's Attack on the French Revolution* (JS Jordan 1791) 10.

[26] Thomas Jefferson to James Madison (6 September 1789) in CF Hobson and RA Rutland (eds), *The Papers of James Madison, 2 March 1789–20 January 1790 and Supplement 24 October 1775–24 January 1789* (University of Virginia Press 1979) vol 12, 382–88.

[27] RR Soder, *Sustaining a Free Society* (Bloomsbury Publishing 2021) 74.

[28] A Lincoln, 'Address before the Young Men's Lyceum of Springfield, Illinois (27 January 1838)' in RP Basler (ed), *The Collected Works of Abraham Lincoln* (Rutgers University Press 1953) vol 1, 108–15.

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of Anglo-American thought on intergenerational obligation: one grounded in limiting the power of the past over the present while recognising each generation's usufructuary position; the other in preserving institutional goods for the future as part of an inherited legal and political order.

After the Second World War, neoliberalism reframed intergenerational responsibility in terms consistent with its emphasis on individual freedom, limited government and market ordering. Political leaders associated with this tradition frequently invoked obligations to future generations as a justificatory vocabulary for policy choices. Ronald Reagan told the United Nations (UN) in 1982 that failing to uphold 'simple justice' would incur 'the bitter wrath of generations yet unborn'.[29] Margaret Thatcher argued in 1988 that 'we do not hold a freehold on our world, but only a full repairing lease', and that this imposed a duty to transmit it 'in good order to future generations'.[30] They helped to normalise the language of 'future generations' in public discourse and paved the way for its appearance in soft law instruments, human rights rhetoric and climate negotiations.

2.5. Synthesis: from intellectual motifs to legal architecture

These historical materials reveal three recurring motifs. First, from Genesis through Aquinas and Burke to Jefferson and Thatcher, a persistent idea of stewardship or usufruct: holders of power or property may enjoy its benefits but ought not to destroy the underlying corpus on which successors will depend. Second, from the Roman *res communes* and Lincoln's 'legal inheritors', certain goods such as territory, institutions and common resources are held under a transgenerational obligation to preserve them. Third, Aristotle's *epieikeia*, the Roman *prodigus* rules and Burkean anxieties about 'waste' all point towards the role of equity and equitable-like ideas as correctives to formal entitlements when their exercise would unjustly prejudice others, including those not yet born.

Together, these intellectual strands furnish the conceptual vocabulary that modern jurists use when they speak of the Earth as a 'trust' for future generations, of States as 'trustees' of natural resources or of present generations holding the planet 'in usufruct'. As subsequent sections of this article argue, these motifs have been channelled along two main doctrinal pathways: public trust models that treat the State as a fiduciary over shared resources, and equitable models, most notably the constructive trust, that focus on unjust enrichment and unconscionable retention of benefits. The historical evolution explains why contemporary debates about intergenerational equity so readily gravitate towards trust, equity and stewardship, and prepares the ground for evaluating which of those legal architectures is best equipped to convert inherited moral intuitions into enforceable obligations across generations.

3. Comparative theories of intergenerational equity

Against this historical backdrop, theoretical accounts of intergenerational obligation have been shaped by John Rawls' theory of distributive justice and Edith Brown Weiss'

[29] R Reagan, 'Address before the United Nations Second Special Session on Disarmament' (17 June 1982) in *Public Papers of the Presidents of the United States: Ronald Reagan, 1982* (US Government Printing Office 1987) 789.

[30] M Thatcher, 'Speech to the Royal Society' (27 September 1988) <https://www.margaretthatcher.org/document/107346>.

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trust-based model of 'planetary' stewardship. Simon Caney has likewise argued that intergenerational justice issues, including those arising from climate change, should be governed by the same kind of distributive principles that regulate justice among contemporaries. He contends that purported differences between intra- and intergenerational contexts (for instance, concerning risk, reciprocity or temporal distance) do not justify exempting present generations from stringent duties to future persons.[31] Conversely, Jonathan Riley argues that intergenerational justice requires 'bespoke' human rights architectures designed to protect future persons as bearers of human dignity, rather than treating intergenerational concern as a rhetorical add-on to existing regimes.[32] Comparatively, as will be examined in Section 3.3, Louis B Sohn questions whether trust-based approaches can supply a universally acceptable foundation for intergenerational equity in international law.

3.1. Rawls: distributive justice 'between generations'

Rawls addresses intergenerational obligations within the architecture of distributive justice. He argues that principles of justice must operate not only among contemporaries but 'between generations', requiring each generation to preserve the conditions necessary for just institutions to endure.[33] In *A Theory of Justice*, he maintains that 'each generation must not only preserve the gains of culture and civilisation, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of capital accumulation'.[34] He acknowledges that determining the precise extent of this duty 'seems to admit of no definite answer', reflecting the difficulty of allocating burdens between temporally dispersed groups who cannot negotiate directly.

Because Rawls's intergenerational savings principle is framed primarily in terms of capital accumulation, it offers limited guidance for addressing environmental degradation or ecological limits, which were not central to his distributive model.[35] Its significance for present purposes is therefore not doctrinal but normative: Rawls provides an influential account of why justice must extend beyond relations among contemporaries. Caney's analysis develops that intergenerational premise in the climate context, arguing that once climate change and related environmental harms are understood as threats to basic interests, there is no principled reason to apply weaker standards of justice simply because the primary victims will be temporally distant rather than contemporaneous.[36]

3.2. Weiss: planetary trust and fiduciary structure

Writing in the context of international environmental law, Weiss develops a legal framework for intergenerational equity. She reconceptualises intergenerational justice

[31] S Caney, 'Justice and Future Generations' (2018) 21 Annual Review of Political Science 475, 482.

[32] S Riley, 'Architectures of Intergenerational Justice: Human Dignity, International Law, and Duties to Future Generations' (2016) 15 JHumRts 272, 284.

[33] J Rawls, *A Theory of Justice* (rev edn, Harvard University Press 2009) 254.

[34] ibid 252.

[35] K Mathis, 'Future Generations in John Rawls' Theory of Justice' (2009) 95 Archiv für Rechts- und Sozialphilosophie 49, 58.

[36] Caney (n 31).

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in terms of a 'planetary trust', positioning each generation as trustee of natural and cultural resources for the benefit of future generations.[37] According to Weiss, 'each generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations', and this relationship entails 'a duty to act for the benefit of beneficiaries with respect to trust matters'.[38] Her account translates Rawls' concern with preserving 'culture and civilization' into the language of trusteeship, with clearly identified roles (trustee and beneficiary) and a conceptual trust res encompassing natural and cultural heritage.

On this account, the planetary trust framework is 'deeply rooted in human behavior and in the cultural norms of communities', on the basis that private-law doctrines such as wills and family trusts already familiarise legal systems with intergenerational responsibility.[39] She argues that the leap from intra-familial arrangements to a planetary trust is one of scale rather than of principle: the same fiduciary logic that governs the administration of a family estate can inform the stewardship of the Earth's resources for future generations.

In her positive law analysis, Weiss identifies the public trust doctrine as the closest existing analogue. Public trusteeship over certain natural resources can be extended conceptually, though not yet doctrinally, into a broader planetary model of fiduciary obligation. In the United States (US), she argues that state and local governments may advance such duties through the exercise of police powers 'to protect the health and welfare of their citizens'.[40] While the planetary trust remains a normative proposal rather than a settled legal doctrine, Weiss' work provides a structured legal vocabulary for articulating duties owed to future generations, grounded explicitly in the doctrines and analogies of equity. This vocabulary has in turn influenced public trust and atmospheric trust litigation, where claimants cast States as trustees of environmental resources for present and future beneficiaries.

3.3. Sohn: equity, universality and scepticism about trust analogies

Louis B Sohn offers a contrasting assessment of the feasibility of Weiss' proposal at the international level. He argues that a doctrine of intergenerational equity cannot rest on the Anglo-American concept of equity or on fiduciary relationships derived from domestic trusts law.[41] Instead, he proposes that 'equity' in the international context must be understood broadly, closer to a general notion of 'justice as fairness' than to a technical body of doctrines.[42] His concern is that equity lacks a uniform meaning across legal traditions, making it an unstable foundation for a universal legal principle. Sohn observes that 'equity under Anglo-American law means one thing, equity under continental law derived from Roman principles means something different … [t]he

[37] EB Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 EcologyLQ 495, 503–04.

[38] ibid 499–500.

[39] ibid.

[40] Weiss (n 1) 9.

[41] LB Sohn, 'Arbitration of International Disputes "ex aequi et bono"' in P Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff 1967) 330.

[42] ibid.

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same is true for equitable principles under Islamic law, Hindu law, Chinese law, and so on'.[43]

For Sohn, the diversity of legal traditions underscores the difficulty of grounding intergenerational obligations in fiduciary analogies that do not command universal acceptance. He notes that international environmental instruments, such as the Stockholm Declaration on the Human Environment, tend to adopt general aspirational language concerning responsibility to future generations, rather than more specific formulations resembling trust-based obligations.[44]

A conceptual tension therefore emerges between the approaches advanced by Weiss and Sohn. Weiss' model relies on fiduciary analogies drawn from Anglo-American trusts law and presupposes that these concepts can be generalised to the international plane. Sohn, by contrast, argues that the diversity of equitable traditions across legal systems precludes grounding a universal principle of intergenerational equity in the vocabulary of fiduciary obligation. On his account, equity must refer to a broad ideal of fairness rather than to technical doctrines associated with trusts. This divergence has significant implications: while Weiss' framework offers a structured legal analogy capable of generating determinate duties, Sohn's conception operates at a higher level of abstraction and does not, in itself, establish fiduciary responsibilities enforceable in positive law.

3.4. Trust analogies in practice: international trusteeship and beyond

Sohn's scepticism regarding the transplantation of Anglo-American trust doctrines into international law has prompted counterarguments pointing to existing trust-like structures within the international legal system. John Head observes that the UN International Trusteeship System, established in 1945, 'reflected the main contours of an equitable trust', even though it did not adopt the terminology or doctrinal features of domestic trusts law.[45] He notes that international institutional arrangements 'bearing the marks of a trust, whether carrying that label or not, have been developed for various other purposes as well, including for environmental protection'.[46]

Later sections of this article argue that a shift in focus is warranted: rather than seeking to universalise the public trust or to construct a planetary trust at the international level, it may be more productive to identify doctrinal vehicles within domestic legal systems that can operationalise intergenerational equity in a way that is legally orthodox and remedially effective. The constructive trust, grounded in unjust enrichment and equitable conscience, and already embedded across common law and mixed jurisdictions, offers one such vehicle. While it shares with Weiss' planetary trust a concern for fiduciary-like responsibilities across time, it is anchored in established doctrine and does not depend on importing the full apparatus of Anglo-American trusts law into international law.

[43] LB Sohn (moderator), 'Equity in International Law' (1988) 82 ASIL Proceedings of the Annual Meeting 277, 290–91.

[44] LB Sohn, 'Stockholm Declaration on the Human Environment' (1973) 14 HarvIntlLJ 423, 457.

[45] JW Head, *International Law and Agroecological Husbandry: Building Legal Foundations* (Routledge 2019) 316.

[46] ibid 317.

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4. International declarations, reports and jurisprudence

Intergenerational equity has appeared across international instruments, policy reports and judicial or quasi-judicial decisions. This section proceeds in four steps. Section 4.1 examines how intergenerational concepts are framed in key declarations and treaty instruments. Section 4.2 surveys the lines of judicial and quasi-judicial authority engaging temporal and intergenerational dimensions of environmental harm. Section 4.3 considers theoretical attempts to reconceptualise the public trust doctrine as a vehicle for intergenerational equity and their limitations. Section 4.4 draws these strands together to identify the failures of the public trust doctrine, preparing the ground for the constructive trust alternative advanced in Section 5.

4.1. International declarations and treaty instruments

A useful starting point is Principle 1 of the Stockholm Declaration on the Human Environment.[47] Principle 1 affirms a right to conditions of life in an environment compatible with dignity and well-being, coupled with a 'responsibility' to protect and improve the environment for present and future generations.[48] The Report of the World Commission on Environment and Development (Brundtland Report) entrenched intergenerational concerns within the discourse of 'sustainable development', defining the concept as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[49] Subsequently, the Rio Declaration on Environment and Development embedded intergenerational language in soft law.[50] Principle 3 states that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.[51]

Article 3(1) of the UN Framework Convention on Climate Change (UNFCCC) provides that States Parties 'should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'.[52] The Paris Agreement follows this pattern.[53] Its preamble states that States Parties 'should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights … as well as intergenerational equity'.[54] Intergenerational equity is repeatedly affirmed as an ideal, but remains preambular, principled and non-self-executing.

[47] 'Report of the United Nations Conference on the Human Environment' (5–16 June 1972) UN Doc A/CONF 48/14/Rev.1.

[48] ibid; cf O Spijkers, 'Intergenerational Equity and the Sustainable Development Goals' (2018) 10 Sustainability 3836.

[49] World Commission on Environment and Development, *Our Common Future* (OUP 1987).

[50] 'Rio Declaration on Environment and Development' (3–14 June 1992) UN Doc A/CONF 151/5/Rev.1, 31.

[51] ibid.

[52] UNGA, 'United Nations Framework Convention on Climate Change' (1994) UN Doc A/RES/48/189, art 3(1).

[53] Conference of the Parties to the UNFCCC, 'Adoption of the Paris Agreement' (12 December 2015) UN Doc FCCC/CP/2015/L.9/Rev/1.

[54] ibid.

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4.2. Judicial and quasi-judicial engagement with intergenerational harm

Within adjudication, intergenerational arguments appear in the following bodies of case law:

(i) early and foundational decisions recognising standing or 'responsibility' to future generations;
(ii) international and regional human rights decisions that foreground the temporal dimension of environmental harms;
(iii) Global South and domestic constitutional cases explicitly invoking intergenerational equity and, in some instances, public trust language; and
(iv) recent climate and public trust litigation in North America and Europe that illustrates both the potential and limits of the public trust as a doctrinal vehicle.

4.2.1. Foundational intergenerational standing and responsibility

The Philippine Supreme Court's decision in *Oposa*[55] is the first judicial consideration of this issue. Children petitioners sought cancellations of timber licence agreements and an injunction on further logging, suing 'for themselves, for others of their generation and for the succeeding generations'.[56] The Court accepted this representative capacity, grounding it in 'the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned'.[57] It characterised the constitutional right invoked as concerning 'self-preservation and self-perpetuation', belonging to 'a different category of rights altogether' that pre-dated the Constitution.[58]

The International Court of Justice (ICJ) Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*[59] likewise acknowledges intergenerational dimensions of environmental harm without formalising a principle. The Court describes the environment as 'the living space, the quality of life and the very health of human beings, including generations unborn', and notes that nuclear weapons pose 'a serious danger to future generations'.[60] Judge Weeramantry's separate opinion goes further, invoking 'intergenerational equity' and arguing that no generation may inflict irreparable environmental damage on its successors, but his reasoning remains non-binding.[61]

4.2.2. Human rights courts and the temporal dimension of climate harm

Another group of cases arises from human rights litigation that confronts the distribution of climate risk. The Dutch Supreme Court's judgment in *Urgenda Foundation v State of the Netherlands*[62] represents a more explicit articulation of intertemporal duties in a

[55] *Oposa* (n 5).
[56] ibid 183.
[57] ibid 185.
[58] 1987 Constitution of the Republic of the Philippines, art II, section 16; cf D Gatmaytan-Magno, 'Artificial Judicial Environmental Activism: *Oposa v Factoran* as Aberration' (2007) 17 IndIntl&CompLRev 1, 27.
[59] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.
[60] ibid 241.
[61] ibid 455.
[62] *State of the Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007 (Judgment, 20 December 2019, Supreme Court of the Netherlands).

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human rights framework. Applying Articles 2 and 8 of the European Convention on Human Rights (ECHR), the Court held that inadequate mitigation breached the State's positive obligations, emphasising that current emissions pose foreseeable risks that will materialise over coming decades, including threats to life and family life.[63] *Urgenda* demonstrates that existing rights instruments can sustain mitigation duties whose primary beneficiaries are future persons, without recourse to an explicit trust or intergenerational-rights provision.

The jurisprudence of the European Court of Human Rights reinforces this line. In *Verein KlimaSeniorinnen Schweiz v Switzerland*,[64] the Grand Chamber held that failures to adopt appropriate mitigation measures could violate Article 8 ECHR, describing climate change as affecting 'not only the applicants, but also future generations' and stressing the need for 'timely and appropriate' State action in light of the progressive intensification of climate impacts.[65]

The German Federal Constitutional Court's decision in *Neubauer*[66] adds nuance. The Court accepted challenges to the Federal Climate Protection Act, holding that deferring steep emissions reductions to the post-2030 period would impose disproportionate constraints on the complainants' future freedoms.[67] It drew a sharp distinction, however, between subjective rights and objective duties: future generations, it held, do not yet hold fundamental rights, but the Basic Law imposes an objective duty of protection with an intergenerational dimension.[68]

4.2.3. Constitutional, regional and Global South jurisprudence on intergenerational equity and the public trust

A third strand comprises Global South and domestic constitutional cases that explicitly deploy the vocabulary of intergenerational equity and, in some instances, public trust. The Inter-American Court of Human Rights (IACtHR) in *Awas Tingni v Nicaragua*[69] foregrounded the temporal dimension of indigenous communal land rights. While not expressly using the term 'intergenerational equity', the Court emphasised the continuity of indigenous land tenure and the importance of preserving the 'legacy of past generations' for future ones, framing land as a locus of obligations across time.[70]

In *Peter K Waweru v Republic*,[71] the High Court of Kenya grounded constitutional environmental rights in international environmental principles and distinguished explicitly between intra- and intergenerational equity. It held that polluted river waters implicated intergenerational equity because watercourses were held 'in trust by the present generation for future generations'.[72] In *Leghari v Federation of Pakistan*,[73] the

[63] ibid.
[64] *Verein KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1.
[65] ibid.
[66] *Neubauer* (n 7).
[67] ibid 109.
[68] ibid.
[69] *Case of the Mayagna (Sumo) Awas Tingni v Nicaragua* (Merits, Reparations and Costs) (Judgment) IACtHR Ser C No 79 (2001) para 149.
[70] ibid.
[71] *Peter K Waweru v Republic* [2007] AHRLR 149 (KeHC 2006) (High Court of Kenya).
[72] ibid.
[73] *Leghari v Federation of Pakistan* [2015] WP No 25501 (Lahore High Court Green Bench).

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Lahore High Court held that the State's inaction on climate policy violated constitutional rights to life and dignity, incorporating inter- and intragenerational equity, the public trust doctrine and other international environmental principles as interpretive tools. The Colombian Supreme Court's decision in *Minambiente*[74] recognised the Colombian Amazon as an entity subject to rights and held that deforestation threatened the constitutional rights of children and future generations. The Court described future generations as 'recipients and owners' of environmental goods and grounded their protection in both an 'ethical duty of solidarity' and the intrinsic value of nature.[75] The judgment is notable for treating future generations as prospective rights-holders, yet it again relies on existing constitutional rights and structural orders rather than a trust in the equitable sense.

State-level US jurisprudence provides an instructive contrast. In *Re Hawai'i Electric Light Co Inc (HELCO III) (Hu Honua)*,[76] the Hawaii Supreme Court held that the Public Utilities Commission was required to consider climate impacts in light of the constitutional right to a 'clean and healthful environment' and the state's public trust obligations to protect 'future generations'.[77] While framed as a constitutional public trust, the obligations are implemented through administrative law standards and judicial review, not through fiduciary accounting or proprietary remedies.

4.2.4. Public trust climate litigation: potential and limits

A fourth, closely related line of cases directly tests the capacity of the public trust doctrine to sustain intergenerational climate claims. In *Juliana v United States*,[78] the Federal District Court accepted that the federal Government holds certain resources in trust for present and future generations and that basic trust principles require the Government to protect those resources from substantial impairment. On appeal, however, the Ninth Circuit Court of Appeals held that the claims, although substantial, were non-justiciable because they required wholesale restructuring of national energy policy, which was beyond judicial competence.[79] *Juliana* thus illustrates a recurring pattern: trial-level openness to intergenerational public trust reasoning, followed by appellate retrenchment on separation-of-powers grounds.

Two recent North American cases crystallise the doctrinal fragility of the public trust doctrine. In *Held v State of Montana*,[80] the state District Court found that provisions of the Montana Environmental Policy Act that precluded consideration of greenhouse-gas emissions violated the Montana Constitution's guarantee of a 'clean and healthful environment' for 'present and future generations'.[81] Because the Constitution itself entrenches both environmental rights and a form of public trust, the Court could describe each generation as 'trustee of the environment for succeeding generations' and strike down inconsistent legislation.[82]

[74] *Minambiente* (n 6).
[75] ibid.
[76] *Re Hawai'i Electric Light Co Inc (HELCO III)* 152 Haw 352, 357 (2023) (Hawaii Supreme Court).
[77] ibid.
[78] *Juliana v United States* No 6:15-cv-01517-TC (D Or, 10 November 2016).
[79] *Juliana* (n 12) 11, 32.
[80] *Held v State of Montana* No CDV-2020-307 (1st Dist Ct Mont, 14 August 2023).
[81] ibid 2.
[82] ibid 97–100.

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By contrast, in *La Rose v Canada*[83] the Federal Court of Appeal affirmed the striking out of a public trust claim by youth plaintiffs, holding that recognising such a doctrine would require the federal Crown to exercise continuous supervision over vast environmental resources and that 'the principles that inform when trust-like duties may be imposed on the Crown are narrow'.[84] The Court reiterated that a general public trust doctrine 'does not exist in Canadian law', making *La Rose* one of the clearest rejections of attempts to translate public trust rhetoric into enforceable common law duties toward future generations.[85]

4.2.5. Climate-related advisory opinions of international courts and tribunals

A further, rapidly developing strand consists of three recent climate-related advisory opinions. Together, they confirm that obligations owed to future generations now form part of the legal reasoning through which international bodies articulate States' climate duties, even if the doctrinal vehicle remains under-specified.

First, the International Tribunal for the Law of the Sea, in its 2024 Advisory Opinion requested by the Commission of Small Island States, held that anthropogenic greenhouse gas emissions that cause ocean warming, sea-level rise and acidification qualify as 'pollution of the marine environment' under Part XII of the United Nations Convention on the Law of the Sea.[86] It derived from this a due diligence duty to prevent, reduce and control such pollution, relying on best available science, the precautionary approach and robust environmental impact assessment. While framed as marine-protection law rather than intergenerational rights, the Opinion foregrounds long-term and potentially irreversible harm to the oceans as a shared resource for present and future generations.

Second, in its 2025 Advisory Opinion on *Obligations of States in respect of Climate Change*, the ICJ affirmed that States must adopt and implement mitigation measures consistent with limiting warming in line with climate science, and must prevent significant transboundary and global environmental harm.[87] It linked these duties to the protection of human rights affected by climate change and identified the adverse effects of climate harm as a threat both to current populations and to future generations, including a corresponding duty of reparation towards particularly vulnerable States.

Third, the IACtHR, in Advisory Opinion OC-32/25 on the *Climate Emergency and Human Rights*,[88] characterised the climate crisis as an urgent and structural threat to dignity in the Americas. It articulated an enhanced due diligence standard requiring States to regulate public and private actors, cooperate internationally and adopt mitigation and adaptation measures in order to prevent foreseeable rights violations affecting both present individuals and future generations, with particular attention to groups in situations of vulnerability.

[83] *La Rose* (n 12) para 62.
[84] ibid.
[85] ibid para 54.
[86] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Case No 31, 21 May 2024) ITLOS Reports 2024.
[87] *Obligations of States in respect of Climate Change* (Advisory Opinion) [2025] ICJ Rep 36.
[88] *Climate Emergency and Human Rights* (Advisory Opinion OC-32/25) IACtHR Ser A No 32 (2025).

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None of these opinions adopts a public trust model or prescribes proprietary or gain-based remedies. They do, however, entrench intergenerational climate obligations at the level of authoritative international interpretation, strengthening the normative basis for domestic courts and human rights bodies to treat intergenerational climate harms as legally cognisable and to experiment with remedial frameworks, including constructive trust reasoning, that can give those obligations concrete effect.

4.3. Reconceptualising the public trust: intellectual proposals and their limits

Mary Christina Wood's 'Nature's Trust' framework proposes that governments hold the natural environment, including the atmosphere, in trust for present and future generations and that this fiduciary status 'breathes legal right' into intergenerational equity.[89] Wood argues that trust principles provide determinate fiduciary standards (prudence, loyalty, impartiality) that can be judicially enforced against States that fail to protect ecological integrity for future beneficiaries. Atmospheric trust theorists extend this logic to the global commons, suggesting that States hold the atmosphere in a form of joint trust and must allocate a 'carbon budget' consistently with intergenerational equity.[90]

Edith Brown Weiss' 'planetary trust' model likewise draws on Anglo-American trust concepts, positing that each generation acts as trustee of the Earth's natural and cultural heritage for both current and future generations.[91] She identifies three core principles, namely conservation of options, quality and access, which are intended to structure intergenerational obligations. Although formulated within international law and policy, Weiss' approach presupposes that trust duties can be generalised beyond domestic equity, with 'mankind' as both beneficiary and, in some formulations, co-trustee.

Caroline Cress and other atmospheric trust critics question whether it is institutionally appropriate for courts, rather than legislatures and specialist agencies, to manage complex climate policy via expansive fiduciary standards. Cress notes that placing 'all management decisions affecting the atmosphere' in the hands of generalist judges with limited scientific expertise risks displacing democratic accountability and technocratic competence.[92]

Moreover, a difficulty, visible in both Wood's and Weiss' models, is their reliance on the terminology of 'trust' that elides the structural requirements of trusts in Anglo-equitable doctrine. Comparative public trust scholarship, particularly James Huffman's, emphasises that ambitious accounts of the doctrine often rest on a mythologised history linking it to Roman law and the Magna Carta, whereas in practice it has supported only limited and carefully defined public rights, in relation to navigation and fishing.[93] As James Huffman and others point out, a legal trust in this tradition requires a settlor,

[89] MC Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (CUP 2013) 335–36.

[90] ibid.

[91] Weiss (n 1).

[92] C Cress, 'It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier' (2013) 92 NCLRev 236, 268; cf AB Klass, 'Modern Public Trust Principles: Recognizing Rights and Integrating Standards' (1983) 82 NotreDameLRev 699.

[93] JL Huffman, 'Why Liberating the Public Trust Doctrine Is Bad for the Public' (2015) 45 Env Law 337, 343–47; JB Ruhl and TAJ McGinn, 'The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?' (2020) 47 EcologyLQ 117, 121–25.

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trustee, beneficiary, trust res and separation of legal and equitable title. Treating 'the people', or humanity at large, as simultaneously settlor, trustee and beneficiary stretches these categories beyond recognition. Neither model resolves the question of how future generations, who lack legal personality, can function as beneficiaries with enforceable rights, a problem mirrored in *Neubauer* and constitutional decisions.

The upshot is that while these projects succeed in foregrounding intergenerational equity and have influenced litigation strategies (for example, in *Juliana*, or atmospheric trust suits in US state courts), they do not furnish a doctrinal path for courts operating within strict common-law or civil-law frameworks. Their reliance on a metaphorical notion of 'trust' runs against both orthodox trusts law and the judicial reluctance, documented previously, to constitutionalise fiduciary duties owed to undefined publics and future persons.

4.4. Doctrinal limits of the public trust doctrine

Four limits are especially salient. First, in many jurisdictions the public trust doctrine simply does not exist as a justiciable doctrine capable of imposing fiduciary-type duties on the State. *La Rose* is explicit: recognising a public trust over air, water and permafrost would require the federal Crown to exercise continuous supervision and control over vast resources. The Court emphasised the limited circumstances in which trust-like duties may be imposed on the Crown and rejected the existence of a general public trust doctrine in Canadian law.[94] Similar reluctance appears, if less starkly, in other common law jurisdictions that have resisted transplanting US-style public trust doctrine into their constitutional orders, reflecting wider scholarly scepticism about ambitious attempts to universalise the doctrine beyond its historically contingent US roots.[95]

Second, where public trust obligations are constitutionally entrenched, courts have been cautious in the remedies that they order. In *Held*, the Court relied on explicit constitutional text requiring the State and 'each person' to maintain a clean and healthful environment 'for present and future generations' and acknowledged an intergenerational trust.[96] Yet, the remedy was declaratory: the impugned statutory provisions were invalidated, but no fiduciary accounting, proprietary relief or ongoing supervisory mechanism akin to trust administration was imposed.

Third, constitutional courts have declined to recognise future generations as rights-bearing beneficiaries. *Neubauer* is paradigmatic: the German Federal Constitutional Court accepted an objective duty of intergenerational protection under the Basic Law but insisted that future generations 'do not yet carry any fundamental rights'.[97] Intergenerational obligations operate on the objective level of State duties, while subjective rights remain confined to existing persons. This asymmetry means that even where public trust or intergenerational language appears in constitutional text, future generations cannot themselves be beneficiaries in the sense required by trusts law; their interests must instead be mediated through present-rights claims.

[94] *La Rose* (n 12) [62].

[95] ibid, cf Huffman (n 93) criticising efforts to expand the public trust doctrine beyond its narrow historical core and warning against its constitutionalisation as a general fiduciary principle.

[96] *Held* (n 80).

[97] *Neubauer* (n 7).

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Fourth, the public trust doctrine as deployed in environmental contexts does not satisfy the structural requirements of a trust in Anglo-equitable doctrine. As Huffman observes, trusts law presupposes a division between legal and equitable title: one person (or set of persons) cannot simultaneously be settlor, trustee and sole beneficiary.[98] In public trust formulations, however, 'the public' or 'the people' often occupy all three positions: they are said to establish the trust, act through the State as trustee and also be its beneficiaries. The State itself frequently enjoys the primary benefit of resource exploitation (through revenues, development, political support), further complicating any separation between legal and beneficial interests.

The cases surveyed in Section 4.2 show that courts are increasingly prepared to acknowledge that environmental harms unfold over time and that present actions constrain future options. They are less willing, however, to superimpose a fully-fledged trust framework on these temporal dynamics. Public trust arguments tend to succeed only where constitutional text already entrenches something akin to a trust (as in Montana or Hawai'i), and even then the resulting obligations are filtered through familiar public-law mechanisms.[99] Where such text is absent, as in *La Rose*, courts resist importing a public trust from US jurisprudence; and where plaintiffs seek to rely on public trust to ground systemic climate remedies, as in *Juliana*, separation-of-powers concerns prove decisive.[100]

Significantly, the public trust lacks: (i) consistent recognition across jurisdictions; (ii) a clear class of beneficiaries with legal personality; (iii) the dual-title structure required for proprietary remedies; and (iv) an accepted basis for judicially managing long-term resource policy without running afoul of democratic theory objections. This doctrinal fragility also bears out, from a different angle, broader concerns that existing human rights frameworks lack an adequate 'constitutional architecture' for intergenerational justice.[101] The argument advanced in this article can be read as one such design proposal at the domestic level: it suggests that constructive trust reasoning can supply part of the missing legal architecture by translating intergenerational human rights concerns into enforceable obligations attached to specific assets.

The next section argues that the constructive trust, properly understood, avoids several of these structural shortcomings. Because it arises by operation of law in response to unjust enrichment or unconscionable retention of benefits, it does not depend on constitutional entrenchment or prior legislative recognition. Its doctrinal foundation in equity, its capacity to attach proprietary consequences to wrongful gains and its recognised flexibility across common law and mixed systems make it a more promising framework for converting intergenerational environmental inequities into legally cognisable obligations attached to specific assets.

5. The constructive trust as a doctrinal vehicle for intergenerational equity

This section argues that the constructive trust provides a more workable, doctrinally coherent and transferable framework for intergenerational equity than the public trust

[98] Huffman (n 93).
[99] *Held* (n 80); *Hu Honua* (n 76).
[100] *La Rose* (n 12); *Juliana* (n 12).
[101] Riley (n 32).

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doctrine, specifically within a human rights architecture. Whereas the public trust's contemporary deployment is uneven, heavily jurisdiction-specific and structurally weak in terms of remedies, the constructive trust is an orthodox equitable institution, already embedded across common law and mixed systems, that can be adapted to address patterns of enrichment and deprivation distributed over time when those patterns crystallise as violations of environmental and related human rights. Section 5.1 outlines the core features of the constructive trust. Section 5.2 surveys key jurisprudence, structured around the functions that make the constructive trust suitable for intergenerational and human rights contexts. Section 5.3 explains how constructive trust reasoning can be applied to intergenerational equity and why, in doctrinal and remedial terms, it offers advantages over public trust approaches. Section 5.4 develops the argument that constructive trust logic is more readily transferable to civil-law and mixed jurisdictions than the historically-contingent public trust, precisely because it dovetails with existing unjust enrichment regimes and constitutional environmental rights provisions. Section 5.5 addresses likely objections and clarifies how constructive trust reasoning can be kept within a recognisable human rights adjudication framework.

5.1. The constructive trust: doctrinal profile and conceptual foundations

The constructive trust emerged in early English Chancery as a response to situations in which legal title was acquired or retained in circumstances that equity regarded as unconscionable. While the doctrine developed within private law, that origin is not disabling for present purposes. Human rights law increasingly addresses hybrid formations of power in which States, State-owned enterprises and inadequately regulated private actors participate in the production and retention of benefits derived from rights-impairing conduct. In such situations, constructive trust reasoning can serve as a remedial model to prevent unjustified benefits from hardening into a legally protected advantage. Modern restitution and equity scholars have emphasised this 'unconscionable retention' function as the core of the institution, whether expressed in the language of unjust enrichment (Burrows) or in broader, conscience-based terms (Millett, Virgo).[102]

In *Keech v Sandford*,[103] the Lord Chancellor held that the renewed lease was held on trust for the beneficiary and insisted that the rule be 'strictly pursued, and not in the least relaxed'.[104] From this decision flows the strict fiduciary no-profit rule: a fiduciary must not obtain and retain any unauthorised benefit by reason of the fiduciary position, regardless of good faith. Functionally, this is a rule that prevents those in structurally privileged positions from converting entrusted power into private advantages, a theme that resonates with human rights constraints on State and corporate abuses of authority.

Modern courts have reaffirmed and generalised this principle. In *Boardman v Phipps*[105] and *FHR European Ventures LLP v Cedar Capital Partners LLC*,[106] the House of Lords and the United Kingdom Supreme Court confirmed that a fiduciary

[102] A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 422; P Millett, 'Bribes and Secret Commissions Again' (2012) 71 CLJ 583, 599–600; G Virgo, *The Principles of the Law of Restitution* (4th edn, OUP 2020) 628.
[103] *Keech v Sandford* [1726] Sel Cas Ch 61.
[104] ibid para 62.
[105] *Boardman v Phipps* [1967] 2 AC 46 (HL).
[106] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

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who receives a profit in breach of duty holds it on constructive trust for the principal and that the principal acquires a proprietary interest in that benefit. In *Attorney-General for Hong Kong v Reid*,[107] the Privy Council extended this reasoning to bribes, treating them as held on constructive trust for the State. These authorities locate the constructive trust at the core of fiduciary accountability: it is the mechanism by which equity strips ill-gotten gains from persons occupying structurally advantaged positions and reroutes those gains to the persons or entities whose interests should have been protected, a logic directly analogous to gain-based remedies for serious human rights abuses.

Although the constructive trust developed in fiduciary contexts, its reach is broader. In *Westdeutsche Landesbank Girozentrale v Islington LBC*,[108] Lord Browne-Wilkinson described a constructive trust as arising by operation of law whenever it would be unconscionable for the holder of legal title to deny another's beneficial interest. In *Paragon Finance plc v D B Thakerar & Co*,[109] Millett LJ similarly stated that a constructive trust arises whenever it would be unconscionable for an owner to assert full beneficial ownership and deny another's interest. Canadian jurisprudence has taken a particularly explicit approach. In *Soulos v Korkontzilas*,[110] McLachlin J characterised the constructive trust as 'an ancient and eclectic institution' of equity, imposed by law not only to address unjust enrichment but more generally to hold persons to high standards of trust and probity and to prevent them from retaining property which, in good conscience, they should not be permitted to retain. On her account, constructive trusts may be imposed even in the absence of material loss or classical unjust enrichment where conscience so requires. Unlike the public trust's often mythic pedigree discussed in Section 4, this 'ancient' status is grounded in a continuous line of equitable practice and case law, rather than in a reconstructed constitutional narrative.[111]

On the remedial side, the common law distinguishes between institutional and remedial constructive trusts. The distinction has generated a substantial theoretical literature: some writers insist that all constructive trusts are 'institutional' in nature and merely recognised by the court, whereas others defend an expressly remedial, discretionary model in which the court may shape proprietary responses ex post to do justice in novel situations (notably McLachlin J in *Soulos* and academic accounts by McInnes and Tey).[112] The Canadian Supreme Court has recognised both models, while English law is more cautious about expressly remedial trusts but accepts institutional constructive trusts across a range of situations. In both traditions, however, the crucial point is that constructive trusts carry proprietary consequences: they create equitable interests in specific assets, permit tracing into substitutes and can support powerful remedies, such as accounts of profits and disgorgement.

[107] *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 (PC).

[108] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL).

[109] *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 (CA).

[110] *Soulos v Korkontzilas* [1997] 2 SCR 217 (SCC).

[111] Huffman (n 93).

[112] M McInnes, 'Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada' (1998) 25 ManLJ 513, 514; *Soulos* (n 110); TH Tey, 'Constructive Trusts: Deciphering and Distinguishing "Institutional" and "Remedial"' (2011) 23 SAcLJ 250, 253–56.

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In many common law jurisdictions, constructive trusts also operate within unjust enrichment frameworks. Canadian law, for example, treats the constructive trust as a possible remedy where a claimant establishes enrichment, corresponding deprivation and absence of juristic reason, in a way that tracks the influential 'unjust factors' analysis associated with Burrows while preserving equity's concern with conscience.[113] By 'juristic reason', Canadian restitution law refers to a recognised legal basis that justifies the defendant's retention of the benefit, such as a valid contract, a gift or a statutory obligation. Thus, if A pays money to B, pursuant to a binding contract, B's enrichment is supported by a juristic reason, being the binding contract, and restitution will not be available. By contrast, where no such legal basis exists, the enrichment may be treated as unjust. In such cases, the trust is not grounded in fiduciary status but in the inequity of allowing a defendant to retain a benefit without legal justification. This unjust enrichment branch sits alongside, rather than replacing, the conscience-based and fiduciary branches. When coupled with human rights obligations such as duties to prevent serious environmental degradation that threatens rights to life, health or private life, this structure offers a way to conceptualise the profits associated with rights-violating conduct as unjust gains to which equity can attach and redirect.

Moreover, the constructive trust is not an exotic or marginal device; it is an orthodox, general-purpose instrument by which equity responds to structurally problematic gains. Its organising criterion is not historical status (for example, whether something has traditionally been labelled a 'public trust') but equitable conscience: whether, in light of identifiable benefits and burdens, it is consistent with good conscience to allow a person or class to retain the benefit free from obligations to others. Doctrinal syntheses by Virgo, likewise, depict the constructive trust as equity's principal means of converting abstract notions of 'conscience' into concrete proprietary consequences. That characterisation dovetails with its proposed role in an intergenerational human rights context.[114]

These features make the constructive trust a plausible candidate for addressing intergenerational harm in a human rights framework, where present actors benefit from resource exploitation while shifting costs onto future persons whose rights to life, health, an adequate environment or cultural integrity will be burdened.

5.2. Jurisprudential functions relevant to intergenerational equity

Rather than cataloguing cases serially, this section groups constructive trust jurisprudence by function, highlighting those aspects most relevant to intergenerational human rights claims: strict fiduciary accountability, unjust enrichment and gain-based remedies, conscience-based intervention in the absence of classic fiduciary relationships and proprietary consequences.

The first relevant function is strict fiduciary accountability. *Keech*, *Boardman*, *FHR* and *Reid* collectively establish that a fiduciary who makes unauthorised profits by virtue of fiduciary status must hold them on constructive trust for the beneficiary, even if no loss can be shown and even if the fiduciary acted honestly.[115] Courts have not shied

[113] Burrows (n 102).
[114] G Virgo, 'The Genetically Modified Constructive Trust' (2016) 2 CanJComp&ContempL 579, 594–95.
[115] *Keech* (n 103); *FHR* (n 106); *Reid* (n 107).

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away from imposing constructive trusts over significant assets in order to enforce this rule. The point is structural: persons in positions of entrusted power may not convert opportunities arising from that position into personal gains. For human rights law, this function is analogous to the remedial principle that public authorities and private actors exercising public functions should not be left with the benefit of conduct that infringes fundamental rights, and that restitutionary or disgorgement-style relief may form part of an effective remedial response where ordinary compensation is inadequate.[116]

A second function concerns unjust enrichment and gain-based remedies. In *Garland v Consumers' Gas Co*[117] and *Kerr v Baranow*,[118] the Supreme Court of Canada confirmed that constructive trusts may be awarded to remedy unjust enrichment where monetary restitution is inadequate, provided there is a sufficient link between the enrichment and a specific asset. The constructive trust in such cases operates as a proprietary response to the unjust enrichment, not as a recognition of pre-existing fiduciary status. This shows that constructive trusts are not confined to classic fiduciary settings; they can be deployed whenever enrichment, deprivation and lack of juristic reason intersect with property. In the human rights context, this is directly relevant for situations in which unlawful environmental degradation found to violate rights to life, health, private life or indigenous cultural rights has generated identifiable profit streams. The same logic that justifies proprietary remedies in private unjust enrichment cases can justify requiring that those profit streams be held and applied in ways that vindicate the rights that were violated, including through measures benefiting future generations. Restitution scholars have long argued that disgorgement and proprietary restitution are justified where wrongful gains would otherwise escape ordinary compensatory logic; constructive trusts provide one principal vehicle through which that logic is implemented by conferring an equitable proprietary interest in specific assets or their traceable proceeds.[119]

A third function is conscience-based intervention beyond formal fiduciary labels. *Soulos* is the leading statement. McLachlin J accepted that constructive trusts may be imposed even without unjust enrichment in the strict sense, where property has been obtained in circumstances such that it would be against good conscience for the defendant to retain it. She emphasised that the category of relationships in which such obligations arise is not closed and that the constructive trust can serve prophylactic, deterrent and institutional functions in holding persons to high standards of honesty and good faith. Earlier English authority such as *Hussey v Palmer*[120] similarly described the constructive trust as a trust imposed whenever justice and good conscience require it, though English law has since moved towards a somewhat more structured conception. This conscience-based branch aligns with human rights courts' increasing reliance on

[116] R Grantham, 'Disgorgement for Unjust Enrichment?' (2003) 62 CLJ 159, 160–61; A Buyse, 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law' (2008) 68 ZaöRV 129, 152.

[117] *Garland v Consumers' Gas Co* [2004] 1 SCR 629 (Supreme Court of Canada).

[118] *Kerr v Baranow* [2011] SCC 10, [2011] 1 SCR 269 (Supreme Court of Canada).

[119] P Tudsri, 'Characterization of Proprietary Restitution in the Conflict of Laws' (2013) 44 OttawaLRev 261, 306; cf D Visser, 'Searches for Silver Bullets: Enrichment in Three-Party Situations' in R Zimmerman and D Johnston (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2004) 555.

[120] *Hussey v Palmer* [1972] 1 WLR 1286 (CA).

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'systemic' or 'structural' remedies in cases involving recurrent violations; it also reflects equity's role in policing 'bad faith' exercises of legal power even in the absence of a pre-existing fiduciary label.[121]

A fourth function concerns proprietary consequences and their systemic significance. Cases such as *Reid* demonstrate that constructive trusts can have dramatic effects, effectively confiscating assets that would otherwise form part of a wrongdoer's estate and reallocating them to the person in whose favour equity intervenes.[122] Academic commentary on such cases has emphasised that constructive trusts can recharacterise the ownership of gains arising from wrongdoing, subordinating competing claims of creditors or third parties where necessary. This confirms that constructive trusts are not merely symbolic declarations of fault; they are capable of redirecting wealth flows in ways that respond to the normative judgment that certain benefits cannot, in good conscience, be retained absolutely. For human rights purposes, this capacity is crucial in contexts where violations are profitable and where ordinary compensatory damages risk leaving the underlying incentive structure intact.

Finally, the distinction between institutional and remedial constructive trusts illustrates the doctrine's adaptability. In *Westdeutsche* and subsequent English cases, institutional constructive trusts arise automatically once specified conditions are met, such as the receipt of property in breach of trust. In Canadian and some other common law authorities (for example, *Soulos* and *Pettkus v Becker*), remedial constructive trusts may be crafted in novel situations, subject to principled constraints, where equitable conscience requires a proprietary response.[123] Both models are relevant for intergenerational equity within a human rights framework: institutional logic allows automatic attachment of trusts to gains at the moment they are realised through rights-infringing conduct, while remedial logic allows courts to design trust remedies ex post in light of systemic patterns of enrichment and harm that have been judicially recognised as violating environmental or related human rights. Taken together, this jurisprudence shows that constructive trusts are routinely used to address structural asymmetries of power and benefit.

5.3. Constructive trusts and intergenerational equity: doctrinal fit and advantages over public trusts

The intergenerational problem is structurally familiar from a human rights perspective: present actors (States, corporations and current populations) obtain significant benefits from the exploitation of finite environmental resources and from activities that emit greenhouse gases, while a substantial portion of the costs will be borne by future persons who have no voice in present decision-making but whose rights to life, health, private and family life, culture and a viable environment are foreseeably threatened. As Caney emphasises, however, these intergenerational patterns are layered onto existing intragenerational inequalities: the present-day beneficiaries of carbon-intensive

[121] G Brosky, S Day and FM Kelly, 'The Authority of Human Rights Tribunals to Grant Systemic Remedies' (2017) 6 CanJHumRts 1, 4; cf LE Strine Jr et al, 'Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law' (2010) 98 GeoLJ 629, 646.

[122] *Reid* (n 107).

[123] *Soulos* (n 110); *Pettkus v Becker* [1980] 2 SCR 834 (Supreme Court of Canada).

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activity are not coextensive with those who will bear the heaviest burdens, either now or in the future.[124] Any plausible account of intergenerational equity must therefore confront not only the temporal distribution of harm, but also the way in which present gains are concentrated among particular States, classes and corporate actors. The constructive trust model proposed here reflects that dual structure by targeting identifiable profit streams associated with rights-violating conduct, rather than treating 'humanity as a whole' as both undifferentiated wrongdoer and victim. Yet, existing human rights practice has not generally taken that step. Human rights bodies have instead tended to rely on positive obligations and proportionality analysis, leaving the remedial implications for unjust gains underdeveloped.[125]

By contrast, the constructive trust does not depend on an a priori characterisation of the State as 'trustee of the public'. It responds instead to the circumstances of enrichment and harm once a human rights violation has been established. This remedial, enrichment-centred orientation picks up the line of analysis developed in the constructive trust literature that treats the institution as a response to wrongful gains and structural opportunism (for example, the theories of 'wrong-based' constructive trusts advanced by Chambers and Virgo), rather than as an exhaustive taxonomy of fixed 'categories'.[126] The doctrinal question is whether present actors have obtained and retained identifiable benefits in circumstances where it would be unconscionable, in light of the rights at issue, to treat those benefits as fully their own, free from obligations to those who will bear the costs.

At the level of unjust enrichment, the basic elements are familiar: (1) an enrichment; (2) a corresponding deprivation; and (3) absence of a juristic reason. One can plausibly argue that certain gains realised from activities that significantly degrade a shared environmental resource constitute an enrichment to the present generation and to specific State or private actors, accompanied by a corresponding deprivation for those who will inherit a diminished environment and whose human rights will thereby be impaired. Once that frame is accepted, a constructive trust can, in principle, be imposed over the gains in question, requiring that they be held not absolutely but subject to obligations to restore, remediate or otherwise protect environmental interests that will matter for future rights-holders.

The conscience-based branch of constructive trust doctrine is equally, and perhaps more, apt. *Soulos* confirms that constructive trusts may be imposed to uphold high standards of probity where property has been acquired in circumstances that engage equitable conscience, even in the absence of strict unjust enrichment.[127] Systemic patterns of environmental exploitation, where actors knowingly pursue profit in ways that foreseeably and gravely compromise the conditions of life for future generations, are at least analogous in moral structure to fiduciaries exploiting their positions for personal gain. The wrongdoing lies not in a breach of an express fiduciary undertaking, but in taking advantage of a structural asymmetry: the incapacity of future persons to

[124] Caney (n 31).

[125] V Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' (2020) 33 LJIL 601, 606.

[126] RN Chambers, 'The End of Knowing Receipt' (2016) 2 CanJComp&ContempL 1, 28–29; Virgo (n 102).

[127] *Soulos* (n 110).

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bargain or protect their own interests against current decision-makers, coupled with the breach of present human rights obligations to avoid exposing individuals to serious environmental risks. In such circumstances, equity's insistence that no one may retain benefits in 'bad conscience' provides a doctrinal foothold for intergenerational constructive trusts that are triggered by, and responsive to, judicial findings of human rights violations. This, in turn, yields a set of concrete advantages over the public trust.

First, constructive trusts do not require constitutional amendment or explicit statutory creation. They arise by operation of law within existing equitable frameworks once a relevant wrong has been found.[128] This is crucial in jurisdictions where courts have rejected efforts to constitutionalise the public trust or have held that a public trust doctrine 'does not exist' in domestic law. A constructive trust claim can be framed in terms of recognised equitable categories of unjust enrichment, wrongful gain or unconscionable retention arising out of an established human rights breach, without inviting courts to import a historically controversial doctrine from another legal system.

Second, constructive trusts do not depend on recognising future generations as immediate rights-holders in the constitutional sense. Courts, as in *Neubauer*, have tended to deny fundamental-rights status to unborn persons, but this does not preclude representative proceedings on behalf of future interests or the use of present claimants as conduits for intergenerational arguments.[129] In constructive trust terms, the present generation's enrichment at the expense of future persons can be addressed by treating certain assets or revenues as impressed with equitable obligations, even if the ultimate beneficiaries are represented through present plaintiffs, guardians *ad litem*, public institutions or human rights bodies.

Third, constructive trusts offer a richer remedial toolkit for human rights adjudication. Public trust litigation has, so far, predominantly yielded declaratory and injunctive relief, with limited or no proprietary consequences.[130] Constructive trusts, by contrast, can support proprietary claims to specific assets or revenue streams, tracing into substitutes and accounts of profits.[131] In intergenerational settings, this would allow courts or human rights bodies to earmark parts of the gains derived from environmentally-harmful activities for the benefit of future persons, whether through dedicated remediation funds, long-term conservation trusts, climate-adaptation funds or other institutional arrangements that satisfy the human rights requirement of effective reparation.

Fourth, constructive trusts are more manageable from the perspective of democratic theory than sweeping public trust models. Public trust critics worry that a broad fiduciary duty to the public allows courts to supervise policy choices in a way that sidelines legislatures and agencies.[132] Constructive trust reasoning, as proposed here, is narrower: it targets specific gains that equity deems improperly retained and imposes obligations only in respect of those gains, and only after a human rights breach has been

[128] *Westdeutsche* (n 108); DWM Waters, MR Gillen and L Smith, *Waters' Law of Trusts in Canada* (4th edn, Carswell 2012) 508.

[129] *Neubauer* (n 7); K Sulyok, 'Transforming the Rule of Law in Environmental and Climate Litigation: Prohibiting the Arbitrary Treatment of Future Generations' (2024) 13 TEL 475, 491, 494.

[130] *FHR* (n 106).

[131] Burrows (n 102) 74; Virgo (n 102) 628.

[132] Huffman (n 93).

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established by reference to existing constitutional or treaty-based standards. Courts remain within their traditional role of regulating unjust enrichment and wrongful gain and of fashioning effective remedies for rights violations, rather than assuming global managerial control over environmental policy. None of this suggests that courts have already recognised an intergenerational constructive trust. They have not done so.

5.4. Transferability: constructive trust logic beyond the common law

The trans-systemic plausibility of constructive trust reasoning is reinforced by the long-standing framing of intergenerational obligation in terms of usufruct. As Section 2 showed, both civil-law doctrine and Anglo-American political thought have understood generational authority over resources as a form of limited enjoyment: present holders may use and take the fruits of a patrimony, but they ought not to impair its substance for successors. Jefferson's characterisation of the earth as held by the living only in a usufructuary capacity crystallises this intuition in expressly temporal terms and links it to questions of debt, waste and institutional continuity.[133] Civil-law concepts of usufruct and patrimonial segregation thus already provide a language in which intergenerational obligations are conceived as constraints on present enjoyment for the sake of future beneficiaries. This vocabulary offers a natural bridge for translating constructive trust logic into civil-law settings without requiring reception of 'trust' as a technical category.

Although the constructive trust is a common law device, its underlying logic is mirrored in other legal traditions, particularly where constitutional or treaty-based environmental rights have been recognised. This increases its appeal as a model for intergenerational equity in a global doctrinal landscape, especially when contrasted with the public trust's uneven reception. Civil-law systems typically do not use trust terminology, but they recognise unjust (or unjustified) enrichment as a general principle. German law provides a suite of 'condictiones' under the law of unjustified enrichment; French law, following the 2016 reform, codifies 'l'enrichissement injustifié' as a residual basis of restitution.[134] These regimes embody the same normative intuition that underpins constructive trusts in unjust enrichment contexts: no one should retain a benefit at another's expense without a recognised legal cause. Similarly, doctrines of abuse of rights, good faith and limits on ownership (such as obligations to respect neighbours, the environment or public order) operate to constrain the otherwise absolute exercise of property rights in ways that resonate with equity's concern for conscience and with human rights limitations on disproportionate interferences with protected interests.

The Québec 'fiducie' and 'patrimoines d'affectation' allow property to be segregated from a person's general patrimony and dedicated to a specific purpose or group of beneficiaries.[135] Comparative private-law scholarship has underlined that Québec patrimonies by appropriation and related social-utility trusts are particularly well

[133] Jefferson (n 26).

[134] Bürgerliches Gesetzbuch (BGB) section 812; Code Civil (France) arts 1303–1304 (as amended by Ordonnance No 2016-131 du 10 février 2016).

[135] Civil Code of Québec CQLR c CCQ-1991, arts 1260–1298; MP Harrington, 'Trusts in Quebec' in M Gillen and F Woodman (eds), *The Law of Trusts: A Contextual Approach* (4th edn, Emond Montgomery 2021) 8.

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suited to environmental protection, including as vehicles for the long-term stewardship of natural resources and cultural heritage.[136] Functionally, these institutions perform the same work a constructive trust would perform under common law: they earmark assets and subject them to legal constraints for the benefit of interests that might otherwise be inadequately protected, including intergenerational environmental interests recognised as aspects of rights to a healthy environment or to cultural continuity. Read through the lens of usufruct, they confirm that domestic private law already accommodates temporal limits on ownership and the idea that present enjoyment must be structured with regard to future claimants.

Constitutional environmental rights provisions provide a further point of convergence. Section 24 of the Constitution of the Republic of South Africa guarantees everyone the right to an environment not harmful to health or well-being and requires measures to secure sustainable development 'for the benefit of present and future generations'.[137] Several Latin American legal orders have moved towards recognising nature as a subject of rights. Ecuador's Constitution explicitly grants rights to nature, Bolivia's Constitution and subsequent Law of the Rights of Mother Earth develop a related model and Colombian courts have recognised the rights of nature through constitutional jurisprudence.[138] Courts in these systems already treat the temporal distribution of environmental harm and benefit as legally relevant and are willing to order structural remedies, often via 'amparo' or 'tutela' proceedings, without invoking public trust language.[139] The constructive trust model can map onto these contexts as a way of structuring proprietary and gain-based remedies when environmental-rights violations have generated identifiable profit streams, while the underlying idea of usufruct, understood as use without destructive depletion, provides a familiar conceptual framework for limiting present gains in light of future interests.

In this landscape, the public trust doctrine is comparatively parochial. It originates in US case law concerning the ownership by individual states of navigable waters and submerged lands and has travelled only unevenly.[140] Outside a small group of common law jurisdictions, courts and legislatures have tended to constitutionalise environmental rights directly, or to rely on administrative and planning law, rather than importing a US-style public trust with private-law fiduciary incidents. The resistance documented in *La Rose*, in which the Court declined to recognise any general public trust over environmental resources, sits comfortably with this broader pattern.[141]

[136] G Gidrol-Mistral, 'L'environnement à l'épreuve du droit des biens' (2017) 62 McGillLJ 687, 688–90; cf SG Ross, 'Heritage Preservation Easements, Urban Property, and Heritage Law: Exploring Canadian Common Law and Civil Law Tools for Responding to International Cultural Preservation Frameworks for Cities' (2022) 72 UTLJ 436, 459.

[137] Constitution of the Republic of South Africa (1996) section 24.

[138] Constitution of the Republic of Ecuador (2008) arts 71–74; Bolivia (Plurinational State of) Constitution of 2009, arts 33–34; Constitutional Court of Colombia, T-622/16 (10 November 2016) (*Atrato River Case*).

[139] Amparo and tutela are forms of constitutional protection proceedings in Latin American legal systems. Although their scope and procedure vary by jurisdiction, both generally provide expedited judicial mechanisms for the protection of fundamental or constitutional rights. *Minambiente* (n 6); *Atrato* (n 138); Civil and Commercial Chamber of the Provincial Court of Justice of Loja (Ecuador), Judgment No 11121-2011-0010, 31 March 2011 (*Vilcabamba River Case).*

[140] Huffman (n 93).

[141] *La Rose* (n 12).

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Constructive trust reasoning, by contrast, can in principle be translated into these systems without insisting on the adoption of the constructive trust as a named category. A civil law court could treat profits from ecologically destructive activities as unjustified enrichment vis-à-vis current and future rights-holders under a constitutional right to a healthy environment and order that a defined portion of those gains be placed in a segregated patrimony or fund dedicated to remediation and protection, drawing on existing enrichment actions, patrimonial-segregation techniques and the established limits on usufructuary powers. A constitutional court in a system that recognises a right to an ecologically balanced environment 'for present and future generations' could characterise severe environmental depletion as a form of unconscionable benefit-retention by present actors and justify proprietary or quasi-proprietary remedies that, in function if not in name, mirror constructive trust relief.[142]

The constructive trust is therefore not proposed as a rigid doctrinal transplant but as a model of how law can convert intergenerational inequities, namely present enrichment coupled with future deprivation of human rights-protected interests, into legally cognisable obligations attached to specific assets. Because its underlying logic is already reflected in unjust enrichment regimes, patrimonies of affectation, constitutional environmental rights and long-standing usufructuary understandings of generational authority, it offers a more adaptable and conceptually coherent foundation for intergenerational equity than the historically contingent and jurisdictionally fragile public trust.

5.5. Objections and limits

5.5.1. Administrability and proof

A first objection is that intergenerational constructive trusts are administratively unworkable: the enrichment at issue appears diffuse, the harms are temporally displaced and the putative res seems to be nothing less than 'the global environment'. This article does not, however, propose a trust over the global environment as such. Instead, it envisages constructive trusts attaching to defined categories of gains that courts already know how to identify and quantify in human rights or environmental litigation: royalties and profits from specific extractive projects found to violate rights to life or indigenous cultural rights; windfall profits from carbon-intensive activities linked to breaches of environmental rights; or revenues from emissions trading and carbon taxation associated with policies held incompatible with rights-based obligations.[143]

Courts routinely receive expert evidence on causation, risk and quantum when determining liability, proportionality and damages; extending that evidentiary practice to determine the scope of a proprietary remedy is complex but not conceptually

[142] Constitution of the Federal Republic of Brazil (1988) art 225; Constitution of the Republic of South Africa (1996) section 24; *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647.

[143] *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Ser C No 172 (2007); *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations) IACtHR Ser C No 24527 (2012); *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights v Nigeria* Communication No 155/96 (African Commission on Human and Peoples' Rights, 2001); *Urgenda* (n 62); *Atrato* (n 138).

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novel.[144] On this view, the constructive trust operates as a second-order remedy that presupposes a prior finding of breach under constitutional, human rights or administrative law standards. Once a breach is established, the court's task is limited to identifying the gains most closely connected to the wrongful conduct and earmarking a defined portion of those gains for restoration, adaptation or conservation measures oriented towards future interests and framed as components of effective reparation.[145] Courts already perform analogous tasks when approving cy-près distributions in class actions, crafting structural injunctions in systemic-rights litigation or establishing dedicated funds in mass tort or transitional justice settlements; the constructive trust framework adds a proprietary dimension to those familiar remedial techniques rather than inviting courts to design climate policy from first principles.[146]

5.5.2. Representation and beneficiaries

A second objection targets the beneficiary structure: constructive trusts presuppose identifiable beneficiaries, whereas future generations lack present legal personality and, as *Neubauer* makes clear, cannot ordinarily be treated as rights-holders in domestic constitutional orders.[147] This difficulty is real, but it is not unique to constructive trusts and is already managed in adjacent doctrinal contexts.[148] Many legal systems permit the enforcement of charitable or public-interest trusts by institutional representatives, such as Attorneys-General, ombudspersons, national human rights institutions or designated public bodies, rather than by individual beneficiaries, and environmental and children's-rights claims frequently proceed through guardians ad litem, non-governmental organisations or public-interest litigants.[149]

Nothing in constructive trust doctrine requires ultimate beneficiaries to litigate in person; what matters is that the beneficial interest is defined with sufficient precision and that an appropriate representative can be identified and supervised.[150] An intergenerational constructive trust could therefore designate institutional or representative beneficiaries, such as a statutory environmental fund, an intergenerational equity fund administered by an independent trustee or a constitutionally recognised environmental agency charged with long-term stewardship and subject to human rights-based accountability mechanisms.[151] Present-day claimants, including youth plaintiffs, affected communities or civil-society organisations, would trigger judicial recognition of the trust and contribute to oversight, while the beneficial orientation of the assets would be explicitly intergenerational and

[144] *Soulos* (n 110) para 45; K Roach, 'Judicial Remedies for Climate Change' (2021) 17 JL&Equality 105, 111; Sulyok (n 129).

[145] *Soulos* (n 110); AD Hicks, 'Conceptualising the Constructive Trust' (2005) 56 NILQ 521, 549–50.

[146] J Kalajdzic, 'The "Illusion of Compensation": Cy Près Distributions in Canadian Class Actions' (2014) 92 CanBarRev 173, 181.

[147] *Neubauer* (n 7); A Nolan, 'Children and Future Generations Rights before the Courts: The Vexed Question of Definitions' (2024) 13 TEL 503.

[148] Sulyok (n 129); M Wewerinke-Singh and AS Fleur Ramsay, 'Echoes through Time: Transforming Climate Litigation Narratives on Future Generations' (2024) 13 TEL 547.

[149] O Breen, 'Charitable Trust Supervision Practice and Procedure in the Common Law World' (2016) 24 ERPL 1141, 1145.

[150] Nolan (n 147); *Reid* (n 107); *FHR* (n 106).

[151] Nolan (n 147); Sulyok (n 129).

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rights-protective.[152] In this way, the constructive trust model respects doctrinal constraints on legal personality yet still allows courts to attach proprietary consequences to present enrichment at the expense of those who will bear future costs.

5.5.3. Democratic and separation-of-powers concerns

The third objection is constitutional: expansive public trust models have been criticised for inviting courts to assume a quasi-legislative role in managing environmental and climate policy, with corresponding risks for democratic accountability and institutional competence.[153] The constructive trust framework proposed here is deliberately narrower in both scope and ambition. It does not posit a freestanding fiduciary obligation to manage entire resource sectors 'for the people' and for future generations; rather, it presupposes that a court or human rights body has already found a breach of existing constitutional, human rights or statutory duties in relation to defined activities. Only then does the question arise whether the gains causally connected to that breach can, in good conscience, be retained absolutely by the wrongdoer or by the present generation.

In answering that question, courts remain within a traditional remedial role: preventing unjust or unconscionable retention of benefits and structuring proprietary consequences accordingly.[154] Legislatures and agencies continue to determine climate and environmental policy; constructive trust relief operates downstream, reallocating specific gains as measures of reparation for adjudicated violations.[155]

5.5.4. Griffith's scepticism and the scope of constructive trust relief

William B Griffith offers the most direct critique of the constructive trust as a vehicle for intergenerational environmental claims.[156] He accepts that a constructive trust is conceptually available but argues that no court could legitimately impose one over broad categories of environmental resources, that there is no determinate trust corpus and that any such regime would require explicit constitutional or statutory authorisation and would unduly constrain current owners.

Properly understood, these objections bite only against a model that seeks to declare 'the environment as a whole' held on constructive trust. This article advances a different claim. It proposes constructive trusts over defined gains causally linked to rights-violating conduct (for example, profits from unlawful extractive projects or carbon-intensive activities found incompatible with environmental or related human rights), not over undifferentiated ecosystems. Once the res is specified as those gains, the 'no corpus' argument falls away: the relevant assets already exist as recognised forms of

[152] *Oposa* (n 5); *Urgenda* (n 62); *Neubauer* (n 7); *SERAC* (n 143); *Atrato* (n 138).

[153] J Nedevska, 'An Attack on the Separation of Powers? Strategic Climate Litigation in the Eyes of US Judges' (2021) 13(8335) Sustainability 1, 3; cf HM Ahmad, 'Boom or Bust: The Public Trust Doctrine in Canadian Climate Change Litigation' (2024) 49(2) Queen'sLJ 1, 26.

[154] *Soulos* (n 110); Hicks (n 145).

[155] Roach (n 144) 521; Nedevska (n 153); A Rocha, 'Conclusions: Courts as Agents of Change' in E D'Alessandro and D Castagno (eds), *Reports and Essays on Climate Change Litigation* (Università degli Studi di Torino 2024) 217, 218, 221.

[156] WB Griffith, 'Trusteeship: A Practical Option for Realizing Our Obligations to Future Generations?' in A Light and A De-Shalit (eds), *Moral and Political Reasoning in Environmental Practice* (MIT Press 2003) 141.

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property, and courts routinely impose constructive trusts over analogous profits in fiduciary-breach and unjust enrichment cases without prior legislative mandate.[157]

Griffith's legitimacy and democracy concerns are likewise overstated when measured against the remedial practice of equity. A court that, following a finding of a human rights breach, declares that particular profits are held on constructive trust and must be directed to remediation or protection is not reallocating ownership of 'the environment' or assuming an ongoing managerial role.[158] It is doing what courts already do in other contexts: preventing unconscionable retention of gains and structuring proprietary consequences ex post. The separation-of-powers worries he raises apply with at least equal force to expansive public trust models that purport to constitutionalise open-ended fiduciary duties over entire resource sectors.[159] By contrast, a targeted, gains-focused constructive trust remedy is narrower in scope, more tightly moored to orthodox equitable doctrine and more compatible with the limited, remedial role that human rights and constitutional courts conventionally occupy.

6. Conclusion

Comparative jurisprudence demonstrates that public trust formulations remain jurisdictionally uneven, conceptually contested and remedially weak. In many systems, courts deny that a general public trust exists at all; in others, they confine the language of public trust to a rhetorical or interpretive role, without the proprietary or fiduciary consequences associated with an orthodox trust.

Against this backdrop, the constructive trust offers a more coherent and legally robust framework for giving intergenerational equity concrete effect within a human rights architecture. Grounded in long-standing equitable principles and the doctrine of unjust enrichment, the constructive trust is an orthodox institution that operates across common law systems and can be translated, in functional terms, into civil law and mixed jurisdictions. It is designed to address structurally problematic gains by preventing those in positions of power from retaining benefits obtained in circumstances which equity regards as unconscionable and, where appropriate, recharacterising those benefits as held for the advantage of others. This logic aligns closely with the protective aims of human rights law, which seeks to prevent one group from benefiting at the disproportionate expense of another and increasingly recognises that serious environmental harms can amount to violations of rights to life, health, private and family life and cultural integrity.

When States or private actors secure identifiable profits through conduct that foreseeably and gravely compromises the environmental conditions on which future rights-holders will depend, the gains in question can be conceptualised as unjust enrichment or as benefits retained in bad conscience. A constructive trust imposed over those gains does not create new primary obligations *ex nihilo*; rather, it provides a second-order remedial response that attaches proprietary consequences to adjudicated breaches of constitutional or treaty-based duties. In this way, constructive trust

[157] ibid; *Reid* (n 107); *FHR* (n 106); *Soulos* (n 110).
[158] *Soulos* (n 110); Roach (n 144).
[159] Griffith (n 156); Nedevska (n 153); Rocha (n 155).

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reasoning addresses a central deficit in current intergenerational practice: the absence of mechanisms capable of redirecting the material benefits of rights-violating conduct towards restoration, adaptation and long-term protection.

This constructive trust model also mitigates some of the democratic and separation-of-powers concerns that have hampered expansive public trust theories. Courts are not invited to assume an open-ended managerial role over 'the environment' as such or to constitutionalise a general fiduciary duty to an amorphous public. Instead, they remain within a familiar remedial role: after finding a breach of existing human rights or constitutional obligations, they determine whether particular gains can, in good conscience, be retained absolutely and, if not, they structure proprietary remedies accordingly. Legislative and administrative bodies continue to set climate and environmental policy; equity intervenes downstream to prevent unjust enrichment at the expense of present and future rights-holders.

The choice facing contemporary legal systems is not merely theoretical. They can persist with public trust formulations that have failed to generate enforceable remedial obligations towards future persons or adopt a model capable of addressing the unjust enrichment at the heart of intergenerational claims. The constructive trust, properly understood and carefully applied, offers the most promising doctrinal path through which intergenerational equity can move from an emergent norm of environmental responsibility to an enforceable component of human rights law.

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