# Reclaiming the Public Trust: Constitutional Limits of Urban Exclusion

By *Eklavya Vasudev*[*]

**Abstract:** This article interrogates the role of the Public Trust Doctrine in adjudicating urban land disputes, particularly in the context of informal settlements. Through a comparative analysis of Indian and South African jurisprudence, it argues that Indian courts have often invoked or mirrored a fiduciary logic that underlies the Public Trust Doctrine. This logic has helped justify evictions and prioritise environmental or planning imperatives over socio-economic rights, thereby reinforcing exclusionary models of urban governance. In contrast, South African courts, despite lacking a formal Public Trust Doctrine, have developed a rights-sensitive and procedurally robust approach that centres reasonableness, participation, and proportionality in eviction decisions. Drawing on urban studies and legal theory, including the proportionality framework and the *Right to the City*, the article proposes a reconceptualization of the Public Trust as a dual-fiduciary framework, obligating the state to uphold both environmental protection and urban inclusion. This reframing seeks to align environmental law with constitutional values of dignity, equality, and participatory governance, offering a pathway toward more just and inclusive urban constitutionalism.
**Keywords:** Public Trust Doctrine; Environmental Law; Right to the City

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## A. Introduction: Environmental Law at the Urban Threshold

As cities expand and transform under the pressures of population growth, infrastructural demands, and environmental degradation—legal disputes over urban land increasingly reflect deeper constitutional tensions. These tensions arise at the intersection of environmental protection, socio-economic rights, and spatial governance[1]—domains often treated separately in legal doctrine but brought into direct conflict in urban housing disputes. Among the legal tools mobilised in this context, the Public Trust Doctrine (PTD)—sometimes explicitly invoked and at other times implicitly relied upon, has emerged as a particularly contested

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1 *Ana Paula Pimentel Walker / María Arquero de Alarcón*, The Competing Social and Environmental Functions of Private Urban Land: The Case of an Informal Land Occupation in São Paulo's South Periphery, Sustainability 10 (2018), p. 4160.

terrain. Originally conceived as a principle of ecological stewardship,[2] the doctrine has been adapted to urban settings in ways that raise questions about its compatibility with constitutional values of inclusion, equality, and participatory governance.[3]

While the PTD formally refers to the judicially developed principle that the state holds certain resources in fiduciary trust for the public, which obliges it to prevent both private appropriation and arbitrary state action, this article uses the term in a broader sense to include an underlying "public trust" norm that animates PTD-like reasoning even when courts do not explicitly invoke the doctrine. In this sense, PTD denotes both the formal doctrine and its normative extension: the idea that public resources must be governed in the collective interest and that state stewardship is constitutionally accountable to present and future generations. Read in this broader way, PTD becomes a useful lens to ask who counts as *the public* in urban land disputes and how informal dwellers' claims are incorporated into, or excluded from, public-interest reasoning. This article also draws on the idea of the "Right to the City" to frame what is at stake in urban land disputes. Used here as a critical heuristic rather than a standalone legal doctrine, the Right to the City captures residents' collective claims to access, use, and help shape urban space, and it problematises the assumption that formal title or technocratic planning priorities exhaust the meaning of legitimate urban belonging. In the context of informal settlements, this idea helps clarify why displacement disputes are not only questions of legality or land use, but also of participation, distributive fairness, and whose needs count within "public interest" reasoning. The concept is therefore deployed to complement proportionality and socio-economic rights analysis, and to support the article's broader claim that trusteeship must be interpreted in an inclusion-sensitive way in the urban context.

In India, courts often rely on a fiduciary or trusteeship conception of public land, echoing the PTD's broader normative logic to justify the removal of informal settlements from urban areas. This jurisprudence often frames informal housing as a threat to environmental order or public interest, reinforcing a technocratic conception of urban planning that excludes the urban poor. Although the terminology of PTD may at times be absent, the idea that the state must act as trustee or guardian of public land for the general good remains central. The result has often been the displacement of vulnerable communities without adequate regard for their socio-economic circumstances or participatory entitlements, and the consolidation of an urban environmentalism that privileges formally planned, wealthier communities while casting informal dwellers as illegitimate occupants of public land.

By contrast, South African courts have developed a more procedurally robust and rights-sensitive approach to urban housing disputes, despite the absence of a formally articulated *Public Trust Doctrine*. Their reasoning reflects elements of a broader public-

2 *Michael C. Blumm / Mary C. Wood,* The Public Trust Doctrine in Environmental and Natural Resources Law, Durham 2021, p. li.

3 *Mary J. Wood*, Public Lands—The Public Trust Doctrine Includes a Right to Equality of Access to Municipal Beach Area, Loyola University Chicago Law Journal 4 (1973), p. 609.

trust logic—in the sense of demanding justification and accountability from the state—but channels these concerns through socio-economic and procedural rights rather than through a single doctrinal framework. Judicial interventions in this context have emphasised procedural fairness, meaningful engagement, and the duty of the state to justify any displacement in light of the constitutional right to adequate housing.[4]Environmental protection remains a constitutional imperative,[5] but it is not permitted to override socio-economic entitlements without proper justification.[6]

This article conducts a comparative analysis of selected Indian and South African judgments to examine how courts mediate the relationship between public land, environmental preservation, and the socio-economic rights of unlawful or informal occupiers. Although informal settlements are not confined to state-owned land, the analysis focuses on cases involving public land because they most directly implicate the state's dual role as both trustee and regulator of land held in the public interest. It argues that the prevailing judicial approach to public land governance in India, often informed by the broader logic of the PTD, reflects a formalist and exclusionary tendency that sidelines constitutional values of dignity, equality, and participation.[7] In contrast, the South African experience, while not without its limitations, offers an alternative framework for balancing competing public interests through deliberative procedures and proportionality-based reasoning. Rather than positioning environmental protection and urban inclusivity as mutually exclusive goals, the article proposes that courts must reimagine the public trust as a dual-fiduciary framework: one that advances ecological sustainability while also safeguarding equitable access to the urban commons.

Methodologically, the article combines doctrinal analysis with comparative constitutional inquiry. It examines key Indian and South African decisions on public or state-owned land and the rights of those who inhabit it, especially where environmental concerns frame the dispute. It also engages with critical scholarship on environmental justice, urban legality, and socio-economic rights to evaluate the normative and institutional consequences

4 *Lilian Chenwi*, Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions, Human Rights Law Review 8 (2008), p. 127.

5 *Constitution of the Republic of South Africa, 1996*, ss. 24, 26, 27.

6 *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg* 2008 (3) SA 208 (CC). In these landmark decisions, the Constitutional Court emphasised that any limitation or interference with socio-economic rights through eviction must be properly justified and must be "just and equitable" in the circumstances, reflecting both procedural and substantive requirements of constitutional accountability.

7 Although participation is not expressly enumerated as a constitutional value in the South African Constitution, it has been consistently recognised by the Constitutional Court as an essential component of democratic governance and accountability. *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), paras 111–115. For this reason, the term is used here in a functional sense, alongside dignity and equality, to denote values that underpin deliberative and inclusive constitutionalism.

of judicial reasoning. The comparison is functional rather than formal: it does not equate doctrinal vocabularies, but assesses how each constitutional order mediates competing claims over public land.

The article proceeds in five parts. Part B traces the evolution of the PTD, understood to include both its formal doctrinal articulation and its underlying fiduciary logic—from its ecological roots to its contemporary application in urban governance. Part C analyses how Indian courts have invoked this logic in ways that can result in exclusionary models of urban planning and environmental protection. Part D turns to South Africa to explore an alternative judicial approach grounded in procedural fairness and constitutional accountability. Part E proposes a normative reconstruction of PTD that integrates proportionality analysis, participatory governance, and insights from the Right to the City. Part F reflects on the broader doctrinal and institutional implications of this reframing for constitutional courts dealing with urban exclusion.

## B. From Commons to Cities: The Public Trust Doctrine and Urban Governance

### *I. Origins and Evolution of the Public Trust Doctrine*

The Public Trust Doctrine is among the most enduring legal principles in environmental law, with roots that trace back to Roman law's conception of common property.[8] In Roman law, *res communes* such as air, sea, and running water were held to be incapable of private ownership and to belong to the public, a principle later absorbed into Anglo-American law through the idea that certain resources, especially navigable waters and shorelines, are held by the state in trust for public use.[9] The modern formulation of PTD, however, owes much to Joseph Sax's seminal article in 1970, which repositioned the doctrine as a tool of judicial intervention to constrain administrative discretion in the management of natural resources.[10] Sax argued that the state bears a fiduciary duty to preserve certain environmental assets for present and future generations, and that courts have a duty to enforce these obligations where state action undermines public access or ecological integrity.[11]While this section traces the formal evolution of PTD as a doctrine, the analysis that follows interprets it more broadly to include its underlying fiduciary logic.

8 *Bruce W. Frier*, The Roman Origins of the Public Trust Doctrine – Domenico Dursi, Res communes omnium. Dalle necessità economiche alla disciplina giuridica, Journal of Roman Archaeology 32 (2019), p. 641.

9 *Roberto Cavallo Perin* / *Dario Casalini*, Water Property Models as Sovereignty Prerogatives: European Legal Perspectives in Comparison, Water 2 (2010), p. 429; *Michael C. Blumm* / *Aurora Paulsen*, The Public Trust as an Antimonopoly Doctrine, Boston College Environmental Affairs Law Review 44 (2017), p. 1.

10 *Joseph L. Sax*, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, Michigan Law Review 68 (1970), p. 471.

11 *Sax*, note 10, pp. 474, 487, 509.

Sax's rearticulation of PTD marked a paradigmatic shift. The doctrine no longer simply preserved public access to rivers or beaches, but provided a normative basis for environmental constitutionalism. Since then, courts in multiple jurisdictions have adopted the principle as a foundational environmental obligation, often linking it to constitutional rights to life, health, and a clean environment.[12] Yet the precise contours of PTD—its scope, enforceability, and normative content vary across jurisdictions, and its doctrinal malleability made it susceptible to both progressive and regressive interpretations. While PTD can function as a constraint on state inaction or corporate overreach, it can also operate as a technocratic tool that privileges environmental or aesthetic values without adequately engaging competing socio-economic interests.

### *II. PTD in Indian Constitutional Environmentalism*

In *MC Mehta v Kamal Nath*,[13] the Supreme Court formally introduced the Public Trust Doctrine into Indian environmental jurisprudence, as part of the broader evolution of environmental jurisprudence under Article 21[14] of the Constitution. In several public interest litigation (PIL) cases, the Supreme Court held that the right to life includes the right to a clean and healthy environment, and that this right imposes positive duties on the state.[15] The Court has explicitly or sometimes implicitly invoked the Public Trust Doctrine and its underlying fiduciary logic, declaring that the state acts as a trustee of all natural resources, which are meant for public use and cannot be converted into private property at the cost of ecological harm.[16]

Initially applied to forests, rivers, and coastal zones, PTD soon migrated to cases involving urban land. Here, its implications grew more complex. As urbanisation intensified, environmental degradation was increasingly attributed to informal settlements, often located on ecologically sensitive land or near public infrastructure. Although courts rarely referenced PTD by name in these contexts, its underlying fiduciary logic surfaced in judgments authorising the removal of informal settlements situated on land designated as environmentally sensitive or reserved for infrastructure. These rulings portrayed informal

12 *Erin Ryan*, Public Trust Principles and Environmental Rights, Harvard Environmental Law Review 49 (2025), p. 259.

13 *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388.

14 *Constitution of India*, art. 21. The provision guarantees the fundamental right to life and personal liberty, which the Supreme Court has expansively interpreted to include access to a clean environment, health, shelter, and livelihood.

15 *Maya Nirula*, Pioneering Decision from the Indian Supreme Court Recognizing Freedom from the Adverse Effects of Climate Change as a Fundamental Right, Columbia Law Blog, 28 August 2024, https://blogs.law.columbia.edu/climatechange/2024/08/28/guest-blog-pioneering-decision-from-the-indian-supreme-court-recognizing-freedom-from-the-adverse-effects-of-climate-change-as-a-fundamental-right/ (last accessed on 13 December 2025).

16 *Shailesh Kumar*, Environmental Governance, Indian Constitutional Framework and the Dilemma of Public Trust Doctrine, Journal of the Campus Law Centre IV–V (2017), p. 5.

settlements as illegal encroachments that violated the state's trustee obligations toward the environment and the public at large.[17]

This application of PTD signalled a shift in the doctrine's function: from safeguarding public access against private enclosure to legitimising state-driven exclusion of marginalised urban populations. In doing so, Indian courts often ignored or downplayed the socio-economic factors that compel the urban poor to occupy environmentally precarious land in the first place. Moreover, these judgments rarely engaged with the procedural or substantive rights of displaced persons, such as the right to housing, rehabilitation, or participation in planning decisions.[18] PTD's fiduciary logic was thus mirrored in ways that reinforced an exclusionary model of urban environmentalism that valorised spatial order and ecological purity over distributive justice.

### *III. Environmental Duties without PTD: The South African Trajectory*

South African constitutional law does not explicitly incorporate the PTD in its formal sense.[19] Instead, environmental obligations arise under Section 24 of the 1996 Constitution, which guarantees every person the right to an environment that is not harmful to health or well-being and imposes duties on the state to protect the environment for the benefit of present and future generations.[20] While Section 24 shares PTD's intergenerational and fiduciary logic, its interpretation by South African courts has avoided some of the exclusionary tendencies evident in Indian jurisprudence. Crucially, Section 24 has not been central to eviction jurisprudence, where courts have grounded their reasoning primarily in socio-economic and procedural rights rather than environmental doctrine.

Rather than treating environmental protection as a justification for limiting other rights, South African courts have interpreted Section 24 in conjunction with socio-economic and procedural rights, particularly the right to access to adequate housing (Section 26) and the right to dignity (Section 10). Judicial interventions in urban eviction cases have tended to emphasise the need for reasonableness, meaningful engagement, and equitable relocation

17 *Naveen Thayyil*, Judicial Fiats and Contemporary Enclosures, Conservation and Society 7 (2009), p. 268. Thayyil examines the Supreme Court of India's decision in *T.N. Godavarman Thirumulpad v. Union of India, (1997) 2 SCC 267*, where the Court assumed responsibility for determining access to and use of forest resources, ostensibly to protect the environment. He argues that this intervention has significantly affected the lives, livelihoods, and habitats of marginalised groups, as the Court's judgments determine who may or may not access forests.

18 *Soumya Ghosal*, In whose interest? – Exploring the court's role in basti evictions and its effects on the residents, Law School Policy Review, 21 January 2021, https://lawschoolpolicyreview.com/2021/12/01/in-whose-interest-exploring-the-courts-role-in-basti-evictions-and-its-effects-on-the-residents/ (last accessed on 7 December 2025).

19 *Andrew C. Blackmore*, Getting to Grips with the Public Trust Doctrine in Biodiversity Conservation: A Brief Overview, African Biodiversity & Conservation 48 (2018), p. 1.

20 Constitution of the Republic of South Africa, 1996, s. 24. The provision guarantees everyone the right to an environment that is not harmful to their health or well-being and obliges the state to protect the environment for the benefit of present and future generations.

policies.[21] Environmental justifications for eviction have not been categorically rejected, but they have been subjected to rigorous scrutiny and balanced against the rights of affected communities.

This judicial posture reflects the broader ethos of South Africa's transformative constitutionalism, which commits the state and its institutions to dismantling structural inequalities inherited from apartheid.[22] Courts have interpreted constitutional rights not in isolation but as interdependent, requiring public institutions to coordinate their duties and justify any rights limitations through participatory and transparent processes.[23] In this context, the absence of a formal PTD has not weakened environmental protections; it has instead limited the doctrinal tendency to elevate environmental interests above socio-economic entitlements through a single overriding framework.

### *IV. The Urban Turn: PTD as a Tool of Spatial Governance*

The migration of the PTD from rural or natural landscapes into urban settings marks a significant doctrinal development. Once applied to rivers, forests, and coasts, PTD is now being used to govern contested urban spaces such as public parks, transport corridors, wetlands, and vacant government land.[24] This "urban turn" reflects both the changing geographies of environmental litigation and the intensifying struggle over land in rapidly urbanising regions.

However, the translation of PTD into the urban context is not merely geographic; it is deeply ideological. In Indian jurisprudence, informal settlement dwellers have at times been portrayed as violators of the public trust, even where their occupancy reflects systemic housing failures or policy neglect.[25] Public land is reimagined as sacrosanct ecological territory, and those who inhabit it without formal title are recast as encroachers rather than rights-bearers. The doctrine, originally intended to preserve the commons for the public, thus becomes a tool for displacing the very populations most reliant on them.

21 *Arthur van Coller*, Judicial Problem-Solving: An Evaluation of Grobler v Phillips and Others [2022] ZACC 32, Law, Democracy & Development 28 (2024), p. 76.

22 *Karl Klare*, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14 (1998), p. 146.

23 *Oliver Njuh Fuo*, Public Participation in Decentralised Governments in Africa: Making Ambitious Constitutional Guarantees More Responsive, African Human Rights Law Journal 15 (2015), p. 167; *New Nation Movement NPC v. President of the Republic of South Africa* Case CCT 110/19, [2019] ZACC 27.

24 *Serena M. Williams*, Sustaining Urban Green Spaces: Can Public Parks Be Protected under the Public Trust Doctrine, South Carolina Environmental Law Journal 10 (2002), p. 23.

25 *Almitra Patel v Union of India* (2000) 2 SCC 679 (characterising informal settlers as encroachers undermining environmental order); *Okhla Factory Owners' Assn v. Government of NCT of Delhi* (2002) 104 DLT 484 (framing informal residents as illegal occupants of public land); contrast *Sudama Singh v. Government of NCT of Delhi* 2010 SCC OnLine Del 612 (recognising rights-based entitlements in relocation and rehabilitation and cautioning against stigmatic portrayals of informal settlers).

By contrast, South African courts have resisted this logic. They have largely addressed environmental and spatial governance through a framework that centres human dignity, participatory governance, and reasonableness. This contrast underscores that the meaning and effects of doctrines like PTD are shaped not only by their legal form but by the broader constitutional culture in which they are deployed.

The urban deployment of PTD thus raises critical questions for constitutional law. Can a doctrine originally designed to protect shared natural resources be adapted to support inclusive urban spaces rather than justify the exclusion of those who inhabit them without formal sanction? What principles should guide courts in weighing environmental protection against socio-economic vulnerability where both values carry constitutional weight?

Answering these questions requires not only comparative analysis but also doctrinal reconstruction. PTD must be reinterpreted as a framework that recognises the complex interplay between environmental sustainability and urban inclusion. As the following sections demonstrate, the divergent judicial trajectories of India and South Africa offer instructive examples for how courts might navigate this terrain.

## C. India's Jurisprudence of Exclusion: Environmentalism, Encroachment, and the Urban Poor

### *I. From Environmental Protection to Spatial Purification*

Over the last three decades, Indian courts have increasingly positioned themselves as active participants in the governance of cities. Through PIL, especially in the realm of environmental law, the higher judiciary has expanded its role from adjudication to ongoing policy supervision,[26] issuing continuing directions, requiring periodic compliance reports, and monitoring implementation. This has blurred the conventional boundary between judicial review and executive governance.

Although rarely invoked explicitly, Indian courts have occasionally drawn on ideas resonant with the Right to the City,[27] especially in the more rights-sensitive Delhi High Court interventions discussed below.

Nowhere is this more visible than in cases involving informal settlements, where judicial interventions frequently blur the lines between environmental protection and spatial control. What begins as an effort to safeguard ecological or civic spaces often culminates in rulings that authorise the large-scale removal of urban poor communities. This convergence of environmentalism and "urban purification" the use of ecological rationales to sanitise

26 *Mihika Poddar / Bhavya Nahar*, Continuing Mandamus – A Judicial Innovation to Bridge the Right–Remedy Gap, NUJS Law Review 10 (2017), p. 19.

27 *Mathew Idiculla*, A Right to the Indian City? Legal and Political Claims over Housing and Urban Space in India, Socio-Legal Review 16 (2020), p. 1.

urban space of populations deemed disorderly—has become a recurring feature of Indian urban jurisprudence.[28]

The judicial turn towards environmental protection in the 1980s and 1990s was initially celebrated for its expansive reading of Article 21 of the Constitution, which guarantees the right to life. In a series of landmark cases, the Supreme Court declared that this right includes the right to a clean and healthy environment.[29] This doctrinal expansion was coupled with procedural innovations such as relaxed standing rules and *suo motu* cognisance. As environmental PIL expanded, it became increasingly entangled with urban land disputes, particularly in metropolitan centres.

In these disputes, courts often treated informal settlements as impediments to environmental restoration, urban mobility, or aesthetic order. While such objectives carry legitimate ecological and civic weight, the framing of informal settlements as inherently polluting or chaotic constructed the urban poor not as constitutional subjects but as threats to urban order.[30]

This logic of exclusion draws strength from the judicial valorisation of planned development and public order. Courts frequently treated city master plans as sacrosanct, despite their politicisation and revision.[31] Slums located on land designated for parks, transport corridors, or civic amenities were read as violations of legality rather than symptoms of housing inequality. The label "encroacher" collapsed displacement, unaffordability, and policy failure into a single, delegitimising category.[32]

What emerged from this jurisprudence was a conception of urban environmentalism that prioritised spatial order over socio-economic inclusion. Rather than interrogating how poverty, labour migration, and inadequate public housing push the urban poor onto marginal land, courts treated their presence as a disruption to urban modernity. The city became a space to be sanitised; informal dwellers a deviation from a legally idealised form.

Crucially, environmental justifications for eviction were rarely accompanied by detailed ecological assessments or harm evaluations. The designation of land as "public" or "environmental" was often sufficient to justify demolition.[33] This evidentiary thinness reflects

28 *Armin Rozencraz*, The Supreme Court of India exceeds its constitutional boundaries, Journal on Environment Law and Policy Development 3 (2016), p. 1.

29 *Sushovan Patnaik*, Giving the Green Signal: The Supreme Court and the Environment, Supreme Court Observer, https://www.scobserver.in/journal/giving-the-green-signal-the-supreme-court-and-the-environment/ (last accessed on 13 December 2025).

30 *Gautam Bhan*, In the Public's Interest: Evictions, Citizenship and Inequality in Contemporary Delhi, Hyderabad 2016; *Usha Ramanathan*, Illegality and the Urban Poor, Economic & Political Weekly 41 (2006).

31 *Bhan*, note 30.

32 *Ramanathan*, note 30.

33 *Idiculla*, note 27; *Asher Ghertner*, Analysis of New Legal Discourse Behind Delhi's Slum Demolitions, Economic & Political Weekly 43 (2008), p. 57.

a broader tendency to conflate legality with environmental value, and informality with degradation.

At the doctrinal level, courts did not always invoke the Public Trust Doctrine expressly. More often, they relied on generic references to public interest, illegality, and protection of state land.[34] Yet the underlying logic of trusteeship remained: public land was to be protected from unauthorised occupation in the name of an undefined public, implicitly aligned with formal residents and elite urban imaginaries.

This vision of environmentalism as spatial purification is not unique to India. It echoes global trends in urban governance.[35] Yet in the Indian context, the authority of the judiciary, the pliability of PIL, and the absence of statutory safeguards for informal dwellers have made this logic particularly potent. The result is a jurisprudence that combines high constitutional language with low procedural scrutiny, privileging elite visions of the city while marginalising the urban poor.

In sum, Indian urban environmental jurisprudence has often operated through a logic of purification rather than inclusion, raising the question whether environmental law advances public trust in a democratic sense or reinforces a spatially exclusive conception of the public.

### *II. Encroachment, Illegality, and Public Interest Reasoning*

A central feature of Indian judicial discourse on informal settlements is the concept of encroachment. While not a formal doctrine, courts have developed a consistent pattern of "public interest" reasoning, invoking civic order, environmental cleanliness, and planned development to justify eviction. This justificatory frame, although distinct from PTD, similarly enables the state to prioritise selective visions of the city over the rights of marginalised residents.

By categorising informal communities as "encroachers", courts treat entire populations as unlawful occupants and thereby lower the threshold of constitutional protection.[36] Illegality becomes not merely a zoning defect but a moral and civic indictment. This framing enables sweeping deployment of doctrines such as public nuisance, defence of public land, and protection of civic order without requiring rehabilitation.

Courts seldom rely on detailed statutory definitions of encroachment. Instead, they lean on abstract appeals to public interest and environmental protection, rarely interrogating

34 *Asher Ghertner*, Rule by Aesthetics: World-Class City Making in Delhi, in: Ananya Roy / Aihwa Ong (eds.), Worlding Cities: Asian Experiments and the Art of Being Global, Oxford 2011, pp. 279, 283–285.

35 *Marcelo Lopes de Souza*, For the Sake of the Common Good? Gentrifying Conservationism and Green Evictions, Nature of Cities, 13 August 2017, https://www.thenatureofcities.com/TNOC/2017/08/13/sake-common-good-gentrifying-conservationism-green-evictions/ (last accessed on 13 December 2025).

36 *Ramanathan*, note 30.

whose interests these categories serve.[37] The logic is formalist: because the occupation is technically unauthorised, removal is presumed justified regardless of vulnerability.[38]

This formalism is reinforced by the judicial separation of legality from justice. As Usha Ramanathan has observed, Indian law treats informality as illegality without acknowledging the state's role in producing or tolerating it.[39] Courts rarely ask why settlements emerge or whether authorities enabled their growth. Complex histories of exclusion are flattened into binary judgments of lawful versus unlawful use.

Even where hardship is acknowledged, it seldom produces robust rights-based reasoning. Rehabilitation is treated as administrative discretion rather than constitutional obligation.[40] Socio-economic rights remain supplementary to planning legality, despite their textual and doctrinal anchoring in Article 21.

The Public Trust Doctrine, even when not expressly invoked, illuminates this logic. At its core, PTD requires the state to protect resources for the public. In urban housing disputes, however, the identity of "the public" remains indeterminate and implicitly exclusionary. Informal dwellers are rarely recognised as part of the beneficiary class.

This selectivity reveals a skewed vision of trusteeship: rivers and forests receive expansive protection, while public land inhabited by the poor is treated as disposable. Trusteeship thus becomes a vehicle for exclusion when untethered from dignity, equality, and participation.

### *III. The Margins of Rights: Socio-Economic Entitlements and Procedural Absence*

Despite intensifying scrutiny of informal settlements, courts have not consistently enforced socio-economic rights in eviction jurisprudence. Rehabilitation is routinely framed as executive policy rather than constitutional duty.

In *Almitra Patel*,[41] *Okhla Factory Owners*,[42] and *MC Mehta*,[43] slum clearance was authorised in the language of pollution control, planning, and environmental order. Informal settlements were framed as sources of disorder, while the rights of affected communities were largely absent from the analysis. Once informality was judicially acknowledged, eviction became a presumed consequence, requiring little inquiry into proportionality or alternatives.

37 *Bhan*, note 30.

38 Ibid.

39 *Ramanathan*, note 30.

40 *Rishika Sahgal*, Evictions, Homelessness and the Constitution: The Delhi High Court and the Limits of Judicial Imagination, Constitutional Law and Philosophy, 12 August 2022, https://indconlawphil.wordpress.com/2022/08/12/evictions-homelessness-and-the-constitution-the-delhi-high-court-and-the-limits-of-judicial-imagination/ (last accessed 13 December 2025).

41 *Almitra H. Patel v. Union of India*, (2000) 2 SCC 679.

42 *Okhla Factory Owners*, note 25.

43 *M.C. Mehta v. Union of India*, Supreme Court Order, 31 August 2020, W.P. (C) No. 13029/1985.

Against this backdrop, two Delhi High Court interventions stand out. In *Sudama Singh*, the Court held that the right to housing forms part of Article 21 and required surveys, eligibility assessments, and protection against homelessness before eviction.[44] Rehabilitation was reframed as constitutional obligation rather than administrative charity. Yet its doctrinal influence remained limited.

The Court's reasoning in *Sudama Singh* also rejected the binary between legal and illegal occupants,[45] recognising that long-term residence, even if technically unauthorised, can give rise to enforceable entitlements when viewed through the lens of human rights and state policy. Yet despite its doctrinal promise, the impact of *Sudama Singh* remained limited. Authorities continued to treat rehabilitation as optional, and courts seldom followed its approach in subsequent eviction cases.

A more ambitious intervention came in *Ajay Maken*,[46] where the Delhi High Court explicitly invoked ideas associated with the Right to the City. It rejected the framing of informal dwellers as mere encroachers and required meaningful engagement, transparency, and adherence to rehabilitation policy. Eviction without due process was linked to violations of dignity, equality, and life.

*Ajay Maken* marks a rare instance in which the judiciary engaged not just with the procedural aspects of eviction but also with the substantive democratic claims of informal residents. The Court required prior notice, detailed surveys, transparency in eligibility determinations, and adherence to the *Delhi Slum & JJ Rehabilitation Policy*.[47] It also linked these requirements to constitutional principles, particularly Articles 14, 19, and 21 emphasising that eviction without due process amounts to a violation of dignity and equality.[48] The judgment thus provided a doctrinal blueprint for rights-compatible eviction governance. However, like *Sudama Singh*, its influence on broader jurisprudence remains precarious. It has not been uniformly adopted by other High Courts, and its approach is often overridden when land use legality or environmental compliance is foregrounded.

These cases demonstrate that the doctrinal architecture for rights-based adjudication exists, but is applied selectively. Courts possess the constitutional tools to condition evictions on proportionality, participation, and rehabilitation. Yet in most urban land disputes, these tools are not invoked. Instead, socio-economic rights are treated as supplementary

44 *Sudama Singh & Others v. Government of Delhi & Another*, (2010) 168 DLT 218 (DB).

45 India often treats unauthorised occupation as a criminal or penal violation, unlike South Africa, where unlawful occupation is explicitly decriminalised under the *Prevention of Illegal Eviction from Unlawful Occupation of Land Act* 19 of 1998 (South Africa).

46 *Ajay Maken & Ors. v. Union of India & Ors.*, Delhi High Court, W.P.(C) No. 11616/2015, judgment dated 18 March 2019.

47 Delhi Urban Shelter Improvement Board, Slum & JJ Rehabilitation and Relocation Policy 2015, https://delhishelterboard.in/main/wp-content/uploads/2012/01/Policy-2015.pdf (last accessed on 13 December 2025).

48 The judgment linked these procedural safeguards to constitutional principles, Constitution of India arts 14 (equality), 19 (freedom), and 21 (right to life and dignity).

considerations - subordinated to planning priorities, land ownership rules, or environmental exigencies. The result is a jurisprudence that risks converting housing into a policy preference, rather than a fundamental right enforceable against the state.

In the context of the Public Trust Doctrine, this omission is particularly significant. If the state is a trustee of public land for the benefit of present and future generations, then that trusteeship cannot be read in purely ecological or infrastructural terms. It must include a commitment to inclusive governance and distributive fairness. Judgments like *Ajay Maken* show that this interpretation is doctrinally possible. But unless it becomes embedded in judicial reasoning across the board, PTD's underlying logic will continue to legitimise exclusion rather than enable transformation.

### *IV. Doctrinal Drift: The Silent Expansion of Public Trust Logics*

Although Indian courts do not consistently invoke PTD in urban eviction cases, its fiduciary assumptions have quietly permeated judicial reasoning. This reflects a form of doctrinal drift: trusteeship logic migrates into eviction jurisprudence without explicit examination.

At its core, PTD holds that the state has a fiduciary duty to preserve certain resources —typically natural assets such as rivers, forests, and coastlines for public use and future generations. In Indian environmental jurisprudence, this doctrine has been deployed expansively to constrain the commodification or privatisation of ecological commons.[49] In these contexts, the "public" is broadly conceived, and the state's obligation is to ensure that environmental resources are managed equitably and sustainably. However, when the subject of adjudication shifts to urban land occupied by the poor, the meaning of "the public" narrows, and the doctrine's protective logic is inverted. The state's fiduciary duty is invoked, implicitly or otherwise, not to shield marginalised residents but to justify their removal in the name of environmental order or civic utility.

This double movement, that is, the expansion of PTD in ecological contexts and its contraction in urban housing disputes reveals a disjuncture in judicial reasoning. Courts readily embrace the trustee metaphor when it serves to limit elite overreach in ecologically sensitive areas, yet resist applying the same logic to protect vulnerable urban populations whose survival depends on informal tenure. In doing so, they adopt a selective interpretation of trusteeship, that recognises future generations but not present ones, natural commons but not inhabited commons, environmental purity but not urban equity.[50]

This selectivity becomes particularly apparent in the treatment of public land. In cases concerning riversides, wetlands, or forests, PTD is used to block commercial development

49 *Ashish Kumar Jha*, Borrowed Concepts, Undefined Boundaries: A Critical Examination of India's Public Trust Doctrine, Scconline, 27 May 2024, https://www.scconline.com/blog/post/2024/05/27/borrowed-concepts-undefined-boundaries-a-critical-examination-of-indias-public-trust-doctrine/ (last accessed on 13 December 2025).

50 For instance, Asher Ghertner shows that courts and planners in Delhi privilege ecological purity, urban aesthetics, and natural commons over the rights of informal residents; *Ghertner* note 34.

or industrial misuse, often citing intergenerational equity and ecological integrity.[51] Yet when public land in cities is occupied by informal settlement residents, courts seldom inquire whether that land serves a vital housing function, or whether its *restoration* to planned use produces social harm. The assumption is that public land has a pre-political function: it exists to fulfil planning mandates, not to accommodate need. This move naturalises the priorities embedded in urban master plans, treating them as expressions of the public interest rather than products of political economy or elite influence.

The result is a flattened vision of public trust, in which ecological or civic cleanliness becomes the overriding objective, and the presence of the urban poor is treated as a breach of fiduciary duty. In this register, the PTD functions not as a tool of democratic accountability, but as a doctrinal shield that insulates courts from engaging with the redistributive dimensions of spatial justice.

What is missing in this picture is a jurisprudence of coexistence where public land can serve multiple, overlapping purposes, and that the state's fiduciary obligations are not exhausted by physical clearance. The doctrine, if interpreted holistically, could support a more inclusive conception of public interest. What also shapes this jurisprudence is an implicit hierarchy of belonging: judicial readings of PTD often assume a pre-constituted "public" whose interests are worth protecting, typically formal residents and authorised users of the city. Informal dwellers rarely feature within this imagined public, which helps explain why their claims to survival, habitation, or use seldom register as public interests capable of constraining state action. Recognising this exclusionary baseline is essential, because a genuinely holistic interpretation of trusteeship would require courts to account for all urban users whose lives depend on public land.

There is precedent for such an approach. As seen in *Ajay Maken*, the Delhi High Court explicitly acknowledged that informal dwellers have a legitimate claim to shape the city, and that state obligations under housing policies and the right to life cannot be displaced by planning imperatives alone.[52] The court's reasoning reflected a deeper understanding of democratic trusteeship where the state's legitimacy derives not only from technocratic efficiency but also from inclusive governance. Embedding this reasoning into PTD logic would mean recognising that trusteeship entails mediation between competing claims, not the automatic displacement of weaker ones.

Furthermore, incorporating constitutional values of dignity, equality, and participation into PTD adjudication could prevent its instrumentalization as a tool of exclusion. As David Bilchitz and Aharon Barak have argued in other contexts, rights limitations must pass a test of proportionality: a structured balancing process that assesses the necessity, suitability, and minimal impairment of state actions.[53] A PTD-informed eviction decision that does not

51 A prime example is *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647.

52 *Ajay Maken*, note 46.

53 *David Bilchitz*, Necessity and Proportionality: Towards a Balanced Approach?, in: Liora Lazarus / Christopher McCrudden / Nigel Bowles (eds.), Reasoning Rights: Comparative Judicial Engage-

engage these tests risks becoming a blunt instrument, one that legitimates state coercion under the guise of public interest without attending to the burdens it imposes.

To move in this direction, courts must adopt a deliberative approach to trusteeship. This would involve recognising that public land, especially in urban contexts, is not a neutral canvas but a site of historical contestation and socio-economic struggle. This requires not abandoning PTD, but deepening it and infusing it with constitutional sensibilities that demand accountability not only for what the state protects, but also for how it protects and from whom.

## D. South Africa's Housing Jurisprudence: Transformative Inclusion Without PTD

### *I. Rights, Procedure, and the Limits of Eviction*

South Africa's urban eviction jurisprudence is rooted not in the PTD, but in a constitutional framework that guarantees socio-economic rights and procedural fairness. Section 26 guarantees the right to access to adequate housing and prohibits evictions without judicial oversight. Section 24 establishes environmental rights but is not interpreted as a vehicle for exclusion.

South African courts have consistently refused to treat unlawful occupation as a basis for extinguishing rights. In landmark cases such as *Olivia Road*,[54] *Blue Moonlight*,[55] and *Joe Slovo*,[56] the Constitutional Court emphasized that the legality of occupation does not negate the duty to respect dignity, provide alternatives, and engage affected communities.

In *Olivia Road*, the Constitutional Court considered the eviction of residents from inner-city buildings deemed unsafe by municipal authorities. The Court acknowledged the city's legitimate concerns about safety and urban regeneration but held that eviction without meaningful engagement violated Section 26. It introduced this concept as a procedural obligation requiring the state to consult with affected communities before seeking judicial authorisation for eviction.[57] The applicants had also challenged the constitutionality of legislative provisions that permitted eviction without the protections afforded by "The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act(1998)", arguing that the State's reliance on building-safety concerns could not justify bypassing constitutional safeguards. The reasoning in the judgment exemplifies the Court's refusal to reduce constitutional adjudication to a binary between legality and illegality. Instead, it framed eviction

ment, Oxford 2014, p. 41; *Aharon Barak*, Proportionality: Constitutional Rights and Their Limitations, Cambridge 2012, p. 179.

54 *Olivia Road*, note 6.

55 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33.

56 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2010 (3) SA 454 (CC).

57 *Olivia Road*, note 6.

as a site of constitutional conflict: a moment when multiple rights and interests must be reconciled through dialogue and proportionality. The Court explicitly rejected a formalist interpretation of rights, insisting that engagement is necessary not only for fairness but for the legitimacy of state action. This procedural device operates as a substantive check: while engagement does not guarantee outcome parity, it ensures that evictions are not carried out unilaterally or without considering the needs of those most affected.

In *Blue Moonlight*, the Court extended housing duties to situations involving private land, rejecting the view that municipalities could defer responsibilities when faced with private eviction claims.[58] The judgment reinforced the idea that socio-economic rights are not aspirational but impose concrete obligations, especially when eviction renders residents homeless. The Court also extended these duties to the private landowner, holding that eviction could not proceed without ensuring that residents would not be rendered homeless, a significant recognition of shared constitutional responsibility in eviction proceedings.

In *Joe Slovo*, which concerned the relocation of residents from an informal settlement to temporary accommodation as part of a government housing project, the Constitutional Court engaged with the tension between developmental planning and resident autonomy. The Court ultimately allowed the relocation but imposed strict procedural conditions: consultation, clarity on timelines, and access to final housing.[59] Notably, several judges expressed concern about the limits of court-enforced eviction orders and underscored the risk of turning constitutional rights into technocratic permissions for displacement. The judgment highlighted the Court's internal deliberation on how to avoid replicating historical patterns of spatial exclusion under a new constitutional order. However, in the subsequent *Joe Slovo 2* decision, the Court recognised that the relocation could not feasibly proceed as ordered, underscoring its willingness to revisit remedial directions when implementation would exacerbate vulnerability.[60]

These decisions reflect a commitment to procedural inclusion as a pathway to substantive fairness. Environmental and planning concerns are not disregarded but must be reconciled with rights through transparent, participatory processes.

### *II. The Architecture of Reasonableness*

The South African Constitutional Court's approach to socio-economic rights, particularly in the domain of housing, has been marked by a doctrinal evolution that favours reasonableness-based review over fixed substantive entitlements. This trajectory reflects a conscious judicial effort to develop a form of constitutional adjudication that balances enforceability with institutional legitimacy, while remaining responsive to the lived realities of poverty,

58 *Blue Moonlight*, note 55.

59 *Joe Slovo*, note 56.

60 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (No 2)* [2011] ZACC 33.

inequality, and spatial injustice. The result is an architecture of reasonableness that does not rely on rigid minimum standards, but instead requires the state to demonstrate that its housing policies and eviction practices are inclusive, participatory, and tailored to meet the needs of the most vulnerable.

The foundational case in this trajectory is *Government of the Republic of South Africa v Grootboom*, where the Court declined to endorse a "minimum core" obligation under Section 26(1) of the Constitution.[61] Instead, it introduced a reasonableness test, requiring that housing policies be comprehensive, coherent, flexible, and attuned to both short-term and long-term needs. The Court held that the right to access housing could not be enforced as an abstract guarantee of shelter for every individual. Rather, it imposed an obligation on the state to take reasonable legislative and policy measures, within its available resources, to progressively realise the right. This rejection of minimum core obligations was not without controversy. Critics argued that it weakened the enforceability of socio-economic rights and allowed the state excessive discretion in determining compliance.[62] However, the Court's formulation of reasonableness was far from deferential. It required that state programmes include provisions for those in crisis situations such as those living in intolerable conditions or facing imminent eviction, and that such programmes be implemented with urgency and equity. In doing so, the Court effectively constructed a procedural threshold for constitutional compliance, shifting the inquiry from what the state must deliver to how it must act.

This approach reiterated the holding in *Minister of Health v Treatment Action Campaign*, where the Court reviewed a health programme through the lens of responsiveness and fairness.[63] This trajectory was later consolidated in *Mazibuko v City of Johannesburg*, where the Court reaffirmed that socio-economic rights are to be enforced through a standard of reasonableness rather than through a judicially defined "minimum core."[64] These criteria were adapted in housing law to assess evictions and resettlement plans.

A central procedural innovation has been meaningful engagement, first articulated in *Olivia Road* and systematised in *Blue Moonlight* and *Joe Slovo*. Engagement is more than notice or consultation; it requires substantive dialogue. The duty lies with the state and cannot be satisfied by perfunctory meetings or blanket notices. This framework reframes residents as rights-bearing constitutional subjects, not obstacles to planning. This approach echoes the earlier guidance in *Port Elizabeth Municipality v Various Occupiers*, where the Constitutional Court held that eviction decisions must balance competing interests with grace and compassion and that the state must engage with unlawful occupiers in a manner

61 *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

62 *Sisay Yeshanew*, Combining the "Minimum Core" and "Reasonableness" Models of Reviewing Socio-Economic Rights, ESR Review 9 (2011), p. 1.

63 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15.

64 *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

consistent with dignity and the prevention of homelessness.[65] In *Blue Moonlight*, the Court held that municipalities must provide emergency accommodation, even when evictions are initiated by private parties. Constitutional obligations cannot be outsourced.

This architecture has important implications for the judicial role. South African courts do not claim to design or implement housing policy; rather, they act as constitutional auditors who assess whether government action aligns with the principles of reasonableness and inclusion. This stance contrasts with the Indian judiciary's interventionist posture in environmental PILs, where courts often substitute their own planning priorities for those of the state. The South African model insists on restraint, but pairs that restraint with normative discipline: the Court will not dictate what the government must do, but it will strike down actions that fail to meet constitutional thresholds.

### *III. Structural Remedies*

South Africa's constitutional jurisprudence on housing rights not only embeds procedural fairness but also demonstrates a willingness to impose structural remedies in the form of judicial orders that go beyond declaratory relief to guide the state's future compliance. These remedies mark a distinctive feature of South Africa's transformative constitutionalism: an approach that seeks to recalibrate institutional relationships without displacing democratic legitimacy. While structural remedies have attracted critique for allegedly stretching judicial authority and straining the separation of powers, South African courts have defended their use where ordinary remedies would be inadequate to secure socio-economic rights.[66] In eviction and land-related disputes, structural orders have become an important tool for ensuring that socio-economic rights are not merely aspirational, but practically enforceable.

The most prominent example is *President of the Republic of South Africa v Modderklip Boerdery*, where thousands of landless people had unlawfully occupied private land.[67] The state failed to provide alternative housing, and the landowner obtained an eviction order. When the authorities did not enforce it, the landowner approached the courts for relief. The Constitutional Court held that continued non-enforcement violated the landowner's constitutional right of access to courts under section 34, as the state's failure rendered the eviction order meaningless. At the same time, immediate eviction would have rendered thousands homeless, and the state had taken no steps to provide alternatives.

To resolve this tension, the Court ordered the state to pay constitutional damages to the landowner for the violation of section 34 and simultaneously required the government to devise and implement a relocation plan for the occupiers. This dual remedy balanced the

65 *Port Elizabeth Municipality*, note 6.

66 *Shanelle van der Berg*, A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa, African Human Rights Law Journal 19 (2019), p. 299.

67 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT 20/04) [2005] ZACC 5.

landowner's property and procedural rights with the occupiers' dignity and housing-related interests, without collapsing either set of rights or allowing state inaction to determine outcomes.

The case illustrates how judicial oversight can safeguard constitutional rights without designing policy. The Court did not craft a housing programme; instead, it required the state to account for, and fulfil, its constitutional obligations. This stands in contrast with Indian jurisprudence, where eviction orders even when justified on environmental grounds are often issued without corresponding mechanisms to ensure meaningful alternatives, monitoring, or remedial follow-up.

Structural remedies were also used in *Residents of Joe Slovo*, where the relocation of informal settlers for a government housing project raised concerns about forced displacement.[68] The Court approved the relocation but imposed conditions: transparent timelines, consultation, and access to final housing. Importantly, it retained supervisory jurisdiction to ensure compliance, signalling that constitutional protection does not end with the judgment. Structural interdicts here were not a judicial incursion into policy but a means of holding the state to its own commitments.

This supervisory model reflects the Court's broader institutional philosophy. Rather than mandating specific outcomes, it creates a dialogic space in which rights holders, government agencies, and sometimes private actors must negotiate solutions that comply with constitutional values. In this respect, the South African approach resonates with Jeff King's concept of judicially managed constitutional implementation: courts issue principled guidelines while deferring to the state on policy detail, ensuring both accountability and flexibility.[69]

There are, however, limits. Structural remedies can be difficult to monitor, and municipalities may lack capacity or political will to comply. In *Joe Slovo 2*, for instance, the Court itself acknowledged that the originally ordered relocation had become practically impossible to execute, underscoring the fragility of remedial supervision when implementation conditions shift.[70] More broadly, compliance in the aftermath of *Joe Slovo* was uneven, reflecting the challenges of sustaining iterative engagement over time.[71]

These concerns are echoed in the wider jurisprudence. Cases such as *Pheko I–III* reveal repeated non-compliance and the need for ongoing judicial intervention,[72] while *Black*

68 *Brian Ray*, Residents of *Joe Slovo Community v Thubelisha Homes and Others*: The Two Faces of Engagement, Human Rights Law Review 10 (2010), p. 360.

69 *Jeff A. King*, Institutional Approaches to Judicial Restraint, Oxford Journal of Legal Studies 28 (2008), p. 409.

70 *Joe Slovo 2*, note 60.

71 *Lilian Chenwi*, Socio-Economic Gains and Losses: The South African Constitutional Court and Social Change, Social Change 41 (2011), p. 427.

72 *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 1)* [2011] ZACC 19; *Ekurhuleni Metropolitan Municipality v Pheko (No 2)* [2012] ZACC 31; *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 3)* [2016] ZACC 20.

*Sash* demonstrates how supervisory jurisdiction can become prolonged and institutionally burdensome, even as it remains indispensable for protecting socio-economic rights.[73] Critics argue that without sustained judicial follow-through, structural remedies risk lapsing into symbolic oversight rather than fostering meaningful accountability.[74] At the same time, these critiques do not undermine the dialogic promise of the model; rather, they highlight the extent to which its success depends on institutional capacity, political cooperation, and the Court's willingness to persist with oversight when state actors resist compliance.

Yet despite these shortcomings, the use of structural remedies signals a normative shift in adjudicating socio-economic rights. Instead of treating courts as passive arbiters or hyperactive planners, the South African model presents them as facilitators of transformation. This contrasts with the Indian pattern where courts often assume a managerial posture over urban governance—issuing directives on slum clearance, environmental preservation, or infrastructure without sustained oversight or inclusive consultation.[75] The South African experience suggests that judicial minimalism need not preclude effectiveness, provided it is accompanied by mechanisms that demand transparency, participation, and justification.

### *IV. Comparative Implications: PTD and Transformative Constitutionalism*

The preceding analysis reveals two divergent judicial logics in the governance of public land and urban housing. In India, the Public Trust Doctrine has become a central, though contested, feature of environmental and urban jurisprudence, shaping how courts evaluate land use, encroachment, and the distribution of public resources. In South Africa, courts have developed an alternative framework grounded in socio-economic rights, procedural obligations, and structural remedies without invoking any formal equivalent to PTD. This contrast raises broader questions about the relationship between doctrine and transformation: how do courts navigate competing public interests, and what legal logics guide their resolution of conflicts between environmental protection and housing rights?

73 *Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8.

74 See *Helen Taylor*, Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation, Constitutional Court Review 9 (2019), p. 247.

75 For a discussion of the South African Constitutional Court's facilitative and dialogic approach to socio-economic rights, see *Jeff A. King*, Institutional Approaches to Judicial Restraint, Oxford Journal of Legal Studies 28 (2008), p. 409; On the Indian Supreme Court's managerial and interventionist approach in cases concerning slum clearance, environmental protection, and urban governance, see *Shylashri Shankar* / *Pratap Bhanu Mehta*, Courts and Socioeconomic Rights in India, in: Varun Gauri / Daniel M. Brinks (eds), Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World, Cambridge 2008, p. 146; *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545; *M.C. Mehta v Union of India* (1987) 1 SCC 395. For critiques of the lack of sustained oversight and inclusive consultation, see *Gautam Bhan*, This Is No Longer the City I Once Knew: Evictions, the Urban Poor and the Right to the City in Millennial Delhi, Environment and Urbanization 21 (2009), p. 127.

The Indian approach reflects a form of doctrinal enclosure, where PTD has migrated from its ecological origins into the domain of urban land governance. While this migration might appear to serve the public interest, it often operates to displace marginalised communities from informal settlements deemed environmentally or civically sensitive. The doctrine is framed in neutral terms such as public interest, ecological balance, civic order but its application reveals a deeper jurisprudential tendency to privilege spatial order over social inclusion. Despite constitutional protections for socio-economic rights under Article 21 and judicial recognition of the right to shelter, PTD is frequently mobilised to override these protections.

Seen from a broader normative perspective, this amounts to competing visions of who constitutes "the public" and whose interests structure the urban commons. In India, trusteeship is often implicitly aligned with formally housed residents and master-plan priorities; in South Africa, the jurisprudence comes closer to a relational, use-based understanding of urban belonging, which resonates with claims associated with the *Right to the City*.

In this context, PTD functions less as a fiduciary principle than as a technocratic rationale for exclusion. Its elasticity allows it to accommodate a range of priorities—urban beautification, infrastructure projects, green space preservation without requiring the state to justify how these priorities were determined or whether they account for distributive justice. Judicial reasoning in such cases tends to focus on land legality, unauthorised occupation, and environmental degradation, sidelining the broader structural conditions that lead to informality. Moreover, procedural safeguards are weak or absent: courts often issue demolition orders without mandating consultation, relocation, or compensation.

South African jurisprudence, by contrast, offers a model of transformative adjudication that foregrounds both rights and process. The absence of a public-trust doctrine has not hindered courts from protecting environmental or civic interests; instead, South Africa's constitutional framework channels these concerns through rights-based reasoning, particularly Section 26(3), which prohibits evictions without judicial oversight that is "just and equitable."[76] This provision, read alongside the Court's explicit rejection of the criminalisation of unlawful occupation, has required courts to analyse evictions as moments of constitutional tension rather than as straightforward questions of land use or illegality. The foundational judgment in *Port Elizabeth Municipality v Various Occupiers* (PE Municipality) crystallises this approach: it holds that even where occupation is unlawful, evictions must be assessed through a humane, context-sensitive enquiry that balances competing values, including environmental management, the rights of landowners, and the historical and socio-economic vulnerabilities of occupiers.[77] Rather than treating *informality as illegality*, South African courts incorporate housing rights, participatory governance, and proportionality to ensure that any interference with occupation is justified through transparent, contextually grounded reasoning.

76 Constitution of the Republic of South Africa, 1996, s 26(3).

77 *Port Elizabeth Municipality*, note 6.

This does not mean that evictions are always prevented or that informal settlements are legally regularised, but that the constitutional framework demands justification and dialogue. Environmental or planning objectives cannot be pursued in abstraction; they must be shown to be necessary, proportionate, and procedurally fair. The result is a legal culture in which socio-economic rights exert real normative force, even in contexts of illegality or infrastructural development.

The South African model also challenges the assumption that public trust necessarily implies environmental priority. If the state is indeed a trustee, then it owes obligations to all members of the public, including those without formal tenure or legal recognition. Trusteeship cannot be equated with ecological purity or middle-class aesthetics alone. The South African jurisprudence, while not articulated through the language of trust, arguably operationalises the fiduciary idea more faithfully: it demands accountability, equity, and justification from public authorities tasked with managing contested spaces.

This comparative insight exposes the risks of conceptual drift in Indian PTD jurisprudence. When courts invoke trusteeship without clarifying who the beneficiaries are, what interests are at stake, or how competing claims are to be balanced, the doctrine becomes a cipher for exclusion. The South African approach, by contrast, embeds balancing within its doctrinal structure, particularly through reasonableness review and meaningful engagement. Even when relocation is deemed necessary, courts impose conditions that aim to preserve dignity and prevent arbitrary displacement.

## E. Reconceptualising the Public Trust Doctrine

This article has shown that while the PTD originated as a safeguard against environmental degradation, its deployment in Indian urban cases has often served to legitimise the displacement of vulnerable communities. Unlike in South Africa where environmental considerations rarely feature in Constitutional Court eviction jurisprudence, and where no direct analogue to the PTD exists,[78] Indian courts have extended the doctrine into urban governance in ways that reinforce exclusionary conceptions of the public interest. To address this, PTD must be reinterpreted as a dual-fiduciary framework that obligates the state to uphold both ecological sustainability and the socio-economic rights of those who depend on public land for shelter and livelihood.

This reconceptualization draws on principles of proportionality, which require that state action affecting rights be suitable, necessary, and minimally impairing.[79] Proportionality offers a doctrinal structure for balancing environmental or infrastructural goals against

78 Environmental considerations do arise though in South African private-law neighbour disputes, for example, *Laskey and Another v Showzone CC* 2007 (2) SA 329 (C) (noise nuisance) and *Herselman v Lane* 2011 (2) SA 601 (FB) (noxious fumes), but these doctrines have no analogue in Constitutional Court eviction jurisprudence under s 26(3), which has not incorporated environmental reasoning.

79 *Barak,* Note 53.

fundamental rights, ensuring that exclusion is not treated as an automatic consequence of illegality. Rather than framing informal settlements as categorical threats to public resources, courts must assess actual harm, the availability of less restrictive alternatives, and the impact on dignity and housing security.

As outlined in the Introduction, the Right to the City is used here as a heuristic that foregrounds participation and inclusive urban belonging, and it helps specify why a trusteeship framework must account for differentiated urban needs rather than presume a single, pre-defined public.

This shift would also require courts to engage more rigorously with the conditions of occupation and the processes of exclusion. Long-term residence, state acquiescence, or lack of viable alternatives should influence judicial determinations on eviction and rehabilitation. Fact-sensitive inquiry must replace assumptions of illegitimacy, and procedural safeguards such as notice, consultation, and meaningful engagement should become integral to public land adjudication.

Such a transformation of PTD does not entail abandoning its ecological foundations. Rather, it strengthens its democratic legitimacy by demanding that the state's fiduciary duties be exercised through inclusive governance and context-sensitive adjudication. Just as environmental harm must be prevented, so too must courts recognise that displacement of the poor can constitute a constitutional harm that violates dignity, equality, and access to shelter.

Courts have a responsibility not only to protect public resources but also to interpret doctrines in ways that advance democratic accountability. If grounded in proportionality and participatory governance, PTD can serve as a principle of democratic trusteeship, enabling courts to balance competing claims over urban land without reproducing exclusion.

### F. Conclusion and Broader Implications

This article has explored how Indian High Courts and the South African Constitutional Court navigate the conflict between environmental protection and socio-economic inclusion in urban land disputes. In India, courts have often relied on the PTD to legitimise evictions, framing informal settlements as encroachments that threaten ecological or civic order. This use of PTD, while presented as upholding the public interest, frequently excludes the urban poor from constitutional protection. In contrast, South African courts, though lacking a formal PTD, have developed a jurisprudence that foregrounds procedural fairness, participatory governance, and reasonableness in eviction cases, demonstrating that environmental and housing rights can be reconciled through constitutional principles.

Rather than abandoning PTD, this article proposes its reinterpretation as a dual-fiduciary framework that obligates the state to protect both ecological resources and the socio-economic rights of those who depend on public land. By incorporating principles of proportionality and insights from the *Right to the City*, courts can ensure that environmental goals are not pursued at the expense of inclusion and dignity.

Ultimately, the legal governance of urban land is not simply a question of ecological stewardship or land use efficiency—it is a test of constitutional accountability in contexts of inequality. Courts play a pivotal role in shaping this balance. To remain faithful to constitutional values, doctrines like PTD must evolve, embedding participation, fairness, and distributive justice at the heart of public land adjudication.