

Claiming Poor Rights:  
*Narratives of Shelter, Space, and Freedom  
in India and Canada*

James Billingsley

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James Billingsley<sup>†</sup>

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## I. INTRODUCTION

The right to shelter, as a judiciable and transformative social and economic right, has so far failed to live up to its noble aspirations.<sup>1</sup> The reasons for this disappointment have been the subject of considerable debate. Some claim that the possible remedies of social and economic

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<sup>†</sup> B.A. (Hons.) Philosophy, 2010; J.D. Candidate, 2014; University of Victoria. Submitted for *Law 359: "Civil Liberties and the Charter"* in satisfaction of a major paper requirement (*Law 390*). Thank you to Professor Jeremy Webber for supervising this paper and for his helpful comments along the way.

<sup>1</sup> Social and economic rights are often regarded as the second generation of human rights. In contrast with civil and political rights, social and economic rights cover basic human needs, including the right to work, the right to an adequate standard of living, the right to health, and the right to shelter. See Young, K.G. "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 13 *The Yale Journal of International Law* 133 at 134.

rights violations are too weak or unfeasible.<sup>2</sup> Others argue that the judiciary lacks the competence to adjudicate such rights — enforcing a right to shelter, for example, is far too complex for a court to manage and far too costly for an unelected judge to enforce.<sup>3</sup> Some go so far as to suggest that social and economic rights might in some circumstances undermine traditional liberal rights such as freedom of religion and expression.<sup>4</sup> Left out of these abstract speculations into the shortcomings of social and economic rights are the individuals most in need of their recognition. Indeed, perhaps the disappointment of these rights stems from an oversight of the very people who lay claim to them.

In the case of the right to shelter, the urban poor claim the right to live in public space. They regard their claim as valid.<sup>5</sup> Keeping this simple proposition in mind, this paper suggests that the possibility of shelter rights, and social and economic rights generally, should be reframed as flowing not from the obligations of the state but from the valid claims of rights-bearers. Too often debates about social and economic rights concern the competency of state institutions while ignoring the competency and agency of claimants. While the state is the apparatus through which rights are lawfully protected and rights-promoting benefits are publically administered, rights themselves are prior to state power. As an emergent property of political communities, rights arise from, depend upon, and find expression in the actions and interactions of free individuals. In this important sense, rights rest on human freedom and social participation, on

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<sup>2</sup> See Khosla, M. “Making social rights conditional: Lessons from India” (2010) 8:4 *International Journal of Constitutional Law (I•CON)* 739 at 740.

<sup>3</sup> See Sunstein, C. R. “Social and Economic Rights? Lessons from South Africa” in *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001); compare Roach, K. “The Challenges of Crafting Remedies for Violations of Social, Economic and Cultural Rights” in M. Langford ed., *Social Economic Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 46-58.

<sup>4</sup> See Sunstein, C. R. “Against Positive Rights” (2003) 2 *East European Constitutional Review* 36.

<sup>5</sup> See Rawls, J. “Justice as Fairness: Political not Metaphysical” (1985) 14:3 *Philosophy and Public Affairs* 223 at 242.

making possible the valid claims of persons, and on taking the claims of others seriously.<sup>6</sup>

This article thus considers the tension between rights, duties, costs, and claims, and the institutions and individuals who negotiate them. My method is comparative. I consider two countries, India and Canada, which through their contrasting institutional, political, and social contexts reveal the inherent complexities of shelter rights. Through this comparative prism, several themes emerge.

First, these narratives illustrate that a right to shelter is just as much a function of the context in which the *claim* to shelter arises as it is a function of constitutional design. The courts do not create shelter rights in a vacuum; nor do shelter rights owe their existence to a single case, court, or legal principle.<sup>7</sup> Instead, the entire political community gives shelter rights their content and meaning — through the dynamics of negotiation and disagreement, for example, between homeless persons and police, social service organizations and governments, academics and judges, business owners and patrons, citizens and the media, and so on. This is not to deny the creative force of the law in the equation of rights.<sup>8</sup> However, the ‘law’ giving effect to shelter rights is shaped, importantly, by diffuse relationships of social ordering.<sup>9</sup>

Rights are not *so* diffuse that they exist without a nexus. To be sure, the second theme emerging from this juxtaposition is that rights-bearers — *e.g.* pavement dwellers and homeless persons — are the original and vital source of the right to shelter. Their claim to the pavement, to

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<sup>6</sup> Rawls, J. “Justice as Fairness: Political not Metaphysical” (1985) 14:3 *Philosophy and Public Affairs* 223 at 242.

<sup>7</sup> In other words, I reject the positivist proposition that the existence of rights depends upon the existence of institutions to adjudicate or enforce them, *i.e.*, rights exist only insofar as they are enforceable. Contrast this argument with Sunstein (2001), *supra* note 3.

<sup>8</sup> This creative force extends beyond the particular legal effects of the justice system. Rights litigation, for example, can crystallize norms of public dialogue. *C.f.* Buhler, S. “Cardboard Boxes and Invisible Fences: Homelessness and Public Space in *City of Victoria v. Adams*.” 27 *Windsor Yearbook of Access to Justice* 209 at 217.

<sup>9</sup> A thought experiment may illuminate this point: why do persons, who possess the benefit of private real property, not invite persons without this benefit to live in their home? Invoking formal legal orders to answer this question would be incomplete. Why a right is *claimed* is informed by broader norms of social ordering.

the park, and to public space, is the point of similarity by which the right to shelter can be collectively recognized and understood.

Accepting the preceding observations invites a third, a normative argument, namely, that the claims of the urban poor must be given equal voice, respect, and representation in society, especially in decision-making processes affecting their lives. Currently, both Indian and Canadian societies fail to meet this condition. If it were met, the valid claims of the urban poor would be balanced in just proportion with the valid claims of others. However, it continues to be the case that these disadvantaged members of society “hardly exist and can only lay claim, modestly, to ‘poor’ rights.”<sup>10</sup> Although the law in both jurisdictions has made *some* room for the claims of the urban poor, these allowances arguably afford nothing more than poor rights and poor remedies, often couched in contemptuous, poor rhetoric.

Fourth, and consequently, this unsatisfactory state of affairs should persuade a repositioning of our rights discourse. Specifically, political actors and justice actors should recognize the systemic disadvantage of the poor in their ability to have their claims heard, respected, and legitimized. This discursive reframing involves enabling the poor to participate meaningfully in collective decision-making procedures that matter to them, thereby increasing correspondence between their claims and the rights afforded. This claims-centered approach encourages creative resolutions to disputes that do not necessarily depend upon complex obligations of state action. Social and economic rights are not always a matter of demanding state resources. Some claim only the dignity and freedom to live and occupy space in the same world as other citizens.

This article is organized in three parts. The first part tells a narrative of India and the

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<sup>10</sup> Government of India, “Need for Ameliorating the of the Have-Nots: Supreme Court’s Judgements” (2009) *Law Commission of India*, Report No. 233.

pavement dwellers; the second turns to Canada and the homeless. These narratives illuminate the themes mentioned above. The third part contrasts the Indian and Canadian narrative and elaborates upon two normative considerations — that members of society should show equal concern and equal respect to the self-originating, valid claims of the urban poor, and that doing so may improve correspondence between such claims and the rights consequently negotiated in our social decision-making.

However, before beginning, I should explain some preliminary points. First, why I have limited my discussion to a right to shelter; second, why I have limited my analysis of this right to India and Canada; and third, I should explain why I have opted to provide a detailed narrative of the leading shelter rights decisions in these jurisdictions. Rather than consider social and economic rights in a general sense, I focus on shelter rights because of their particular impact on the ability to participate in the processes of citizenship, the very processes that negotiate claims, create rights, and impose duties upon institutions and individuals. As for the second preliminary matter, I respectfully adopt the reasons of Vivek Krishnamurthy that India and Canada are excellent constitutional comparators in their familial resemblance of, “the common law, Westminster-style parliamentary democracy, and federalism.”<sup>11</sup> But I also limit myself to these countries because of their fundamental differences. The points of contrast between India and Canada provide valuable insight into how shelter rights vary according to the assets and needs of the respective society in which they are adjudicated. Finally, I offer what I hope is a human narrative of these issues to emphasize the reality and significance of the people who claim shelter, space, and freedom — an element that is too often overlooked in our deliberations over rights and our relationship to them.

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<sup>11</sup> Krishnamurthy, V. “Colonial Cousins: Explaining India and Canada’s Unwritten Constitutional Principles” (2009) 34 *The Yale Journal of International Law* 207 at 211.

## II. THE RIGHT TO SHELTER IN INDIA

### A. *The Pavement Dwellers*

A useful beginning for the Indian narrative is *Olga Tellis v. Bombay Municipal Corporation* (“*Olga Tellis*”).<sup>12</sup> The celebrated case concerned the “pavement dwellers” in Bombay (now Mumbai).<sup>13</sup> Approximately half of Mumbai’s inhabitants are slum and pavement dwellers, who live in informal settlements on eight percent of the city’s land.<sup>14</sup> Pavement dwellers take on multiple definitions in the academic literature — ranging from broad descriptions (e.g. “homeless persons residing on public property”)<sup>15</sup> to more critical conceptions (e.g. “insurgent citizens”).<sup>16</sup> For the purposes of this story, suffice it to say that pavement dwellers build their homes and live their daily lives on the pavements of the city.

In July 1981, the Bombay Municipal Corporation and the State of Maharashtra began massive demolitions of its slum and pavement settlements. Section 61 (D) of the *Bombay Municipal Corporation Act of 1888* conferred upon the government an “obligatory and discretionary duty” to remove “obstructions and projections in or upon streets, bridges and other public places.”<sup>17</sup> Section 314 of the Act specified that this power could be executed “without notice.”<sup>18</sup> Pursuant to these provisions, inhabitants of pavement settlements were forcibly evicted

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<sup>12</sup> *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 S.C.C. 545.

<sup>13</sup> Mumbai, located on the west coast of India, is the capital of the state of Maharashtra and the most populous city in India. Since the 1970s, Mumbai has experienced a gradual process of deindustrialization where it has shifted from a textile economy to a financial and commercial centre. *Cf.* Knudsen, A-M S. “The Right to the City: Spaces of Insurgent Citizenship Among Pavement Dwellers in Mumbai, India” (2007) *DPU (Development Planning Unit)* Working Paper No. 132.

<sup>14</sup> *Ibid.*, at 11.

<sup>15</sup> Khosla, *supra* note 2 at 746.

<sup>16</sup> Knudsen, *supra* note 13 at 8.

<sup>17</sup> See Khotari, J. “Right of Housing: Constitutional Perspective on India and South Africa” (June 2001). In particular, s. 61 (d) of the *Bombay Municipal Corporation Act of 1888* provides that, “It shall be incumbent on the corporation to make adequate provision, by any means or measures which it is lawfully competent to them to use or to take,” *inter alia*, “the reclamation of unhealthy localities,” and, “the abatement of all nuisances.”

<sup>18</sup> *Bombay Municipal Corporation Act of 1888*.

and relocated. Many communities were destroyed. Little recourse was available for the pavement dwellers, which were poor, often of low caste, and without political power. However, with the help of community organizations, journalists, and civil rights groups, some pavement dwellers began to resist the city's development plans, including inhabitants of *Kamraj Nagar*, an informal settlement near the Western Express Highway, and inhabitants of a settlement nearby the Tulsi Pipe Road in Mahim.<sup>19</sup> These pavement dwellers, alongside the concerned citizens who supported their cause, petitioned the Bombay High Court to stop the mass demolitions.<sup>20</sup>

The law was not on their side. The petitioners had no right to live on the pavements and streets of Bombay, for their dwellings encroached upon publically owned land. The presiding judge nonetheless granted a temporary interlocutory order to delay the demolitions until mid-October 1981, after the monsoon rains had subsided. Unbowed and having bought a bit of time, the pavement dwellers appealed to the Supreme Court of India, the highest appellate body in the country. The petitioners argued that:

- (1) evicting pavement dwellers amounted to depriving them of their right to a livelihood, which is comprehended by Article 21 of the Constitution;
- (2) actions of the government constituted an unreasonable restriction of the right, "to practise any profession, or to carry on any occupation, trade or business"<sup>21</sup>;
- (3) lack of a notice requirement in Section 314 of the *Bombay Municipal Corporation Act of 1888* was arbitrary and unreasonable;
- (4) pavement dwellers were not 'trespassers,' because their occupation of public space arose out of economic necessity.

The case was under judgement for four years before the Supreme Court rendered its

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<sup>19</sup> *Olga Tellis, supra* note 11 at para 64. The Kamraj Nagar settlements comprised 500 hutments built in 1960. Its inhabitants were municipal employees, factory workers, hotel workers, construction supervisors, and so on. Residents of the Tulsi Pipe Road hutments claimed they had lived on the land for 10 to 15 years.

<sup>20</sup> This claim was possible because of the Indian Supreme Court's relaxed rules on standing in public interest litigation. See Khosla, *supra* note 2 at 743.

<sup>21</sup> *Constitution Of India* 1949, Article 19(1)(g).



decision. Notably, the court held that any action on the part of the public authorities would be in violation of the fundamental rights of the pavement dwellers;<sup>22</sup> however, “how well-founded the argument regarding the *existence and scope* of the right claimed by the petitioners is another matter.”<sup>23</sup> In determining the existence and scope of the rights claimed, the reasoning of the Supreme Court has been described as “ambivalent,” “eclectic,” and “perplexing.”<sup>24</sup> Chief Justice Chandrachud, speaking for the court, turned to the guarantees of the Indian Constitution. He held that Article 21 of the Constitution — no person shall be deprived of his life or personal liberty except according to procedure established by law — was “wide and far reaching.”<sup>25</sup> It not only means that life cannot be taken away except in accordance with the law, but it also includes a right to livelihood, “because no person can live without the means of living.”<sup>26</sup> Chief Justice Chandrachud recognized that the mass migration of people from rural villages to the pavements of Bombay is explained by the maxim that a livelihood is that which makes it possible to live — that the pursuit of a livelihood is “the motive force” by which people deserted “their hearts and homes in the villages that struggle for survival.”<sup>27</sup> To aid in this interpretation, the Chief Justice relied on Part IV of the Constitution, or the “Directive Principles of State Policy.”<sup>28</sup> Specifically, Article 39(a) affirmed that the state should direct its policy to guaranteeing the right of Indian citizens to an adequate means to livelihood.<sup>29</sup> Article 41, moreover, provided that the state, within the limits of its economic capacity and development, should make effective provision for

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<sup>22</sup> *Olga Tellis*, *supra* note 11 at para 54.

<sup>23</sup> *Ibid.*, at para 54.

<sup>24</sup> *See re* ‘perplexing’: Bapat, M. “Bombay’s Pavement-Dwellers: Continuing Torment” (1992) 27 *Economic and Political Weekly* 31. *See re* ‘eclectic’: Ramanathan, U. “Demolition Drive” (2005) 40:27 *Economic and Political Weekly* 2908-12 at 3607.

<sup>25</sup> *Olga Tellis*, *supra* note 11 at para 55.

<sup>26</sup> *Ibid.*, at para 55.

<sup>27</sup> *Ibid.*, at para 79.

<sup>28</sup> Part IV of the *Constitution Of India* 1949, *supra* note 20.

<sup>29</sup> *Ibid.*

securing the right to work in cases of unemployment and under deserved want.<sup>30</sup> While Article 37 qualified that the Directive Principles are not enforceable by the judiciary, the Chief Justice went on to say that the principles are fundamental in understanding and interpreting the meaning of the judiciable civil and political rights in Part III of the Constitution, particularly the right to life in Article 21.<sup>31</sup>

Notwithstanding the rights-affirming rhetoric of Chief Justice Chandrachud's decision, the actual remedy afforded to the pavement-dwellers was limited. The Chief Justice added that Article 21 does not provide, "an absolute embargo in the deprivation of life or personal liberty," for the right to life, and by extension, the right to livelihood, can still be deprived according to procedure established by law.<sup>32</sup> Sections 312(1), 313(1)(a), and 314 of the *Bombay Municipal Corporation Act of 1888* conferred upon the city, in "clear and specific" terms, the power to regulate the streets by removing encroachments on pavements.<sup>33</sup> This power, according to the court, was neither unreasonable nor unjust.<sup>34</sup> The pavement, being public property, was never intended for private use. Further, it was held that the pavement dwellers had *no competing interest* against the pedestrians because a pedestrian using the pavement for the purpose of passage is "legitimate and lawful."<sup>35</sup> However, "if a person puts any public property to a use for which it is not intended and is not authorised so to use it, he becomes a trespasser."<sup>36</sup> The court even went through pains to defend the "without notice" provision, holding that while it enables the city to remove encroachments without notice, this enabling provision is discretionary. Discretion, with or without notice, must be exercised in a *reasonable* manner, "so as to comply

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<sup>30</sup> Part IV of the *Constitution Of India* 1949, *supra* note 20.

<sup>31</sup> *Olga Tellis*, *supra* note 11 at para 80.

<sup>32</sup> *Ibid.*, at para 56.

<sup>33</sup> *Ibid.*, at para 85.

<sup>34</sup> *Ibid.*, at para 59.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable.”<sup>37</sup> In short, the court ordered that the city must ensure that a fair procedure for eviction is followed.

A procedural safeguard is thus the active element and crux of the *Olga Tellis* decision. While the pavement dwellers have a right to a livelihood, they have no corresponding right to live on the pavement.<sup>38</sup> While the pavement dwellers may, in certain circumstances, find their hutments demolished without notice, they *do* have the assurance that this decision must be exercised in a reasonable fashion that accords with established principles of natural justice and procedural fairness. The right to a livelihood thereby finds expression in the opportunity for pavement dwellers to be heard, to challenge the discretionary actions of the city on a case-by-case basis.<sup>39</sup>

#### B. *The Aftermath of Olga Tellis*

Following the decision, do pavement dwellers possess meaningful and robust shelter rights, or as the Chairman of the Law Commission of India put it, do pavement dwellers “only lay claim, modestly, to ‘poor’ rights”?<sup>40</sup> Practically speaking, the grand-scale demolition plans of the state and municipal corporation were thwarted even before the Supreme Court decision was released, owing to diverse forces in local politics, namely, the voluntary organizations,

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<sup>37</sup> *Olga Tellis*, *supra* note 11, at para 88. The power should also be exercised “sparingly and in cases of urgency which brook no delay” (at para 89).

<sup>38</sup> Compare Khosla, *supra* note 2 at 747, who argues that *Olga Tellis* provides no *individualized* right to shelter nor requirement that the state take *reasonable measures* to provide for shelter.

<sup>39</sup> The court in *Olga Tellis* also outlines some ways in which a person can respond to a notice at para 90 (*supra* note 11): (i) there was, in fact, no encroachment; (ii) the encroachment was so negligible that it did not cause any nuisance or inconvenience to the public; (iii) time should be granted for the removal for compassionate grounds.

<sup>40</sup> Government of India, *supra* note 9, at 13.

journalists, and mobilized pavement dwellers who made the issue one of national importance.<sup>41</sup> In this sense, a ‘right’ to shelter was advanced notwithstanding the specific legal remedy in *Olga Tellis*. Perspectives on poverty shifted as many Indian citizens came to recognize that pavement dwellers’ circumstances were caused by structural inequalities within Indian society rather than through any fault of their own.<sup>42</sup> State policies were also implemented to provide alternative accommodation in instances of resettling weaker sections of society.<sup>43</sup> These changes did not occur as a result of the particular *legal* remedy of the Supreme Court decision, but they reflected a broader narrative of which the *Olga Tellis* decision was a central chapter, possessing deep symbolic value of the conversations and changes taking place in Indian society at the time.<sup>44</sup>

Beyond symbolism, the decision did offer some substantive rights to the petitioners. The court decided that the petitioners could not be evicted until one month after the end of the monsoon season. Moreover, certain dwellers who were interviewed for the 1976 census, who held identity cards, and whose dwellings were numbered in the census were to be provided with alternate sites for their resettlement.<sup>45</sup> Thus, in the limited circumstances where alternative accommodation could be arranged for a subset of petitioners, a constitutional right to shelter was upheld.

However, smaller-scale demolitions continued to occur with regular frequency.<sup>46</sup> Community organizations reported that the Bombay Municipal Corporation was not following

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<sup>41</sup> See e.g., Bapat, *supra* note 23 at 2217.

<sup>42</sup> C.f. Khosla, *supra* note 2 at 765 (on cases like *Olga Tellis* changing social meanings). But see Mahmud, T. “Slums, Slumdogs, and Resistance” (2010) 18:3 *Journal of Gender, Social Policy & The Law* 685 (arguing that “[c]ollective identities, duties to others, and social solidarities are increasingly banished from public discourse. This has a profoundly negative impact on the potential and scope of social movements that aim at foundational transformations of collective life” at 701).

<sup>43</sup> See Khosla, *supra* note 2 at 748.

<sup>44</sup> *Ibid.*, at 761.

<sup>45</sup> *Ibid.*, at 748. This remedy supports Khosla’s argument that the Indian judiciary adopts a conditional approach to social and economic rights. The remedy flowed from the state’s failure to follow through on its decision to allot land for slum dwellers, and not from any systemic right to shelter.

<sup>46</sup> See e.g., Bapat, *supra* note 23 at 2217.

the Supreme Court’s recommendations to make demolitions humane by avoiding them during monsoon season and providing alternative accommodation for those evicted.<sup>47</sup> Some demolitions resulted in the confiscation of the personal belongings of the pavement dwellers while others resulted in outright violence.<sup>48</sup> Thus, while any decision to demolish a pavement dwelling contemplated procedural safeguards by law, many inhabitants did not have the visibility, support, and resources that the petitioners of *Olga Tellis* relied upon to challenge the eviction. In these cases, the opportunity to be heard was nothing more than an empty shell — the same poverty that compelled these inhabitants to take up shelter on the streets likewise prevented them from participating in the processes necessary to question the state action taken against them. Finally, even in instances where pavement dwellers did have the means to challenge the evictions of their settlements, the response of the court was often mixed and unpredictable.<sup>49</sup> Compromise had to be struck. Such is the nature of poor rights.

C. *“Humanitarianism Must Be Distinguished from Miscarriages of Mercy”*:<sup>50</sup>  
*Regressive Trends and Lingering Ambiguities*

While some cases have followed the reasons of *Olga Tellis* to give substantive meaning to the rights of the urban poor, judicial support for shelter rights has diminished significantly in more recent years.<sup>51</sup> The earlier case law that followed the rights-promoting precedent of *Olga Tellis* case law concerned disputes arising out of government housing policies seeking to allot land to “weaker sections” of society.<sup>52</sup> One such policy was at issue in the case of *Shantistar*

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<sup>47</sup> See e.g., Bapat, *supra* note 23 at 2217.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Pitampura Suhar Samiti v. National Alliance of Peoples’ Movement*, Delhi Chapter 27.9.2002.

<sup>51</sup> The third part of this paper considers that one reason for this regression lies in the conditional structure of the right to shelter in *Olga Tellis*.

<sup>52</sup> The “weaker sections” of society is a term of constitutional art. Article 41 of the *Constitution Of India* 1949, a Directive Principle of State Policy, states that the state, “shall promote with special care the

*Builders v. Narayan K Totame* (“*Shantistar Builders*”).<sup>53</sup> The Government of Maharashtra set aside land for the construction of 1500 flats for members of the weaker sections of society, but builders and real estate speculators misappropriated the land by escalating construction rates.<sup>54</sup> The Supreme Court of India sided with the petitioners and directed the government to implement the housing scheme as originally stipulated. The court commanded that builders would not allot any flats without first establishing, through a means test, that the housing applicants constituted the constitutionally defined weaker sections of society.<sup>55</sup> On the right to life, the court elaborated that:

The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be a suitable accommodation, which would allow him to grow in every aspect - physical, mental and intellectual.<sup>56</sup>

The case of *Ahmedabad Municipal Corporation vs Nawab Khan Gulab Khan & Ors* (“*Ahmedabad Municipal Corporation*”) concerned pavement dwellers that constructed huts on footpaths on Rakhial Road, the main thoroughfare in Ahmedabad, Gujarat.<sup>57</sup> Pursuant to the mass demolitions in the early eighties, the Ahmedabad Municipal Corporation sought to remove their encroachments on December 10, 1982. Twenty-nine petitioners sought judicial review of the decision from the Gujarat High Court. The High Court granted interim stay of

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educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.” At the time of the *Shantistar Builders* decision, members of the Scheduled Castes and Scheduled Tribes were accepted as belonging to “the weaker section,” but no official guideline clarified which other Indian citizens was contemplated by the term. The court in this case provided a working guideline of a family’s income not exceeding Rs. 18000, and left it open to the government to implement another means test.

<sup>53</sup> *Shantistar Builders v. Narayan K Totame* (1990) 1 SCC 520.

<sup>54</sup> *Ibid.*, at para 7.

<sup>55</sup> *See infra* note 52.

<sup>56</sup> *Ibid.*, at para 9.

<sup>57</sup> *Ahmedabad Municipal Corporation v. Nawab Khan*, (1997) 11 S.C.C. 121.

removal on February 20, 1991, directing the Municipal Corporation not to remove the encroachments until alternate accommodation was provided for the petitioners. The Corporation appealed to the Supreme Court. The Supreme Court's decision on the matter was not given until November 10, 1996, fourteen years after the action began. By that time, only ten of the original twenty-nine petitioners remained on Rakhial Road. Relying on *Olga Tellis* and *Shantishar Builders*, Justice K. Ramaswamy, speaking for the court, held that the remaining petitioners were entitled to the opportunity to benefit from a scheme of alternative accommodation provided for by the Municipal Corporation. The judge reiterated that an encroacher, if ejected, could not always be guaranteed alternate accommodation at the expense of the state. Instead, each case must be adjudicated according to its particular facts and circumstances. In this case, the Municipal Corporation had a duty to provide means for settlement under the *Urban Land Ceiling Act*. The court allowed the petitioners to apply for inclusion in the statutory regime.<sup>58</sup>

These aforementioned decisions contrast starkly with more recent case law, such as the Supreme Court decision of *Union Of India vs Howrah Ganatantrik Nagarik* (“*Howrah Ganatantrik*”).<sup>59</sup> In this case, the High Court of Calcutta ordered squatters to vacate railway property they were occupying, but in the interim, the court directed the State of West Bengal and the railway administration to provide sanitary facilities to the squatters. Justice N. Santosh Hegde of the Supreme Court reversed this order, finding, “no reason why the railways or for that matter State of West Bengal should be directed to provide sanitary facilities even as an interim

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<sup>58</sup> *Ahmedabad Municipal Corporation v. Nawab Khan*, (1997) 11 S.C.C. 121. If they were ineligible, they would still face ejection from their hutments. Eligibility turned on considerations such as the length of the pavement dweller's occupation of the footpaths.

<sup>59</sup> *Union Of India v. Howrah Ganatantrik Nagarik* (2003) S.C.C. This trend began as early as 1993 when Justice B. N. Kirpal in *Lawyers' Cooperative Group Housing Society v. Union of India* (1993) CW No 267 and CM 464 of 1993, Delhi High Court, stated that “[i]t appears that the public exchequer has to be burdened with crores of rupees for providing alternative accommodation to jhuggi dwellers who are trespassers on public land.” See Ramanathan. “Illegality and the Urban Poor” (2006) *Economic and Political Weekly* 3193 (“[*Lawyer's Cooperative*] was the beginning of the de-legitimising of the urban poor who were cast as “trespassers” and as profiteering on public lands” at 3194).

measure.”<sup>60</sup> The growing reluctance by the judiciary to direct the state to provide impoverished citizens with alternative relief is similarly echoed in *Okhla Factory Owners vs The Govt. Of NCT of Delhi* (“*Okhla Factor Owners*”).<sup>61</sup> In this case, the Delhi High Court quashed a government policy to acquire land under the *Land Acquisitions Act* for the purposes of allocating it to encroachers who had to be removed and relocated from public property. The court held that this policy encourages “persons to encroach on public land” as well as “dishonesty and violation of [the] law.”<sup>62</sup> The court followed the reasoning of *Ahmedabad Municipal Corporation* that the Constitution cannot *require* the state to provide alternative accommodation for encroachers ejected from public land, and further found that, “in fact normally such encroachers should not be provided with alternative accommodation as it would only encourage the illegal act of encroachment.”<sup>63</sup> The court held that the policy served no social purpose since the criteria for entitlement, trespassing on public land, was illegal.<sup>64</sup>

Justice B.N. Kirpal’s reasons in the Supreme Court decision of *Almitra Patel v. Union of India* (“*Almitra Patel*”) provide the most telling indication of how the approach of the courts to the urban poor has shifted in the decades following *Olga Tellis*.<sup>65</sup> Exasperated at the amount of garbage that continues to pollute New Delhi and the inability of municipal authorities to remedy the situation, Justice Kirpal considered how the problem is complicated by “a large number of inhabitants [who] live in unauthorised colonies, with no proper means of dealing with the

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<sup>60</sup> *Union Of India v. Howrah Ganatantrik Nagarik* (2003) S.C.C. at para 3.

<sup>61</sup> *Okhla Factory Owners v. The Govt. Of NCT of Delhi*, 108 (2002) D.L.T. 517

<sup>62</sup> *Ibid.*, at para 35.

<sup>63</sup> *Ibid.*, at para 45. The court did note that it was open for the city to devise a policy for rehabilitation of the economically weaker sections of society. However, criteria of this policy could not include encroachment on public lands.

<sup>64</sup> See Ramanathan, *supra* note 54 (“[s]triking down the resettlement policy would mean not merely that resettlement would not be a prerequisite for demolition, but it would actually render resettlement illegal” at 3916).

<sup>65</sup> *Almitra Patel v. Union of India*, (2000) 2 S.C.C. 679.



domestic effluents, or in slums with no care for hygiene.”<sup>66</sup> According to Justice Kirpal, rewarding these encroachers, who are attracted to “the promise of free land, at the taxpayers cost,” is like “giving a reward to a pickpocket.”<sup>67</sup> This view was echoed by Justices Ruma Pal and Markandey Katju of the same court who remarked on the demolitions of Nagla Machi in New Delhi that “[i]f you are occupying public land, you have no legal right, what to talk of fundamental right, to stay there a minute longer.”<sup>68</sup>

Taken together, these diverging examples from the case law reflect the rhetorical and substantive ambivalence of *Olga Tellis*. They should ask us to pause and consider the extent to which the much-celebrated decision in fact guarantees rights to livelihood and shelter. At times the Supreme Court displays a nuanced understanding of the systemic inequalities facing the urban poor, while at other times it shows nothing but contempt for slum and pavement dwellers. The latter sentiment often emerges out of frustration, when government schemes and social policies fail.<sup>69</sup> Some commentators argue that the notice and hearing rights afforded to the pavement dwellers have been “reduced to a grudging formality.”<sup>70</sup> Others show more optimism about the distinct remedies provided in these cases, arguing that their private law dimension allows courts to engage in expressive rights-affirming discourse without obliging the provision of systemic benefits beyond the state’s capacities and resources.<sup>71</sup> Yet more recent case law, like *Almitra Patel*, has shown that even the expressive function of rights is subject to ideological reconstruction.<sup>72</sup> The adoption of a discourse of illegality of pavement dwellers undermines the validity of their claims to shelter. It perpetuates negative perceptions that the urban poor are

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<sup>66</sup> *Almitra Patel v. Union of India*, (2000) 2 S.C.C. 679.

<sup>67</sup> *Ibid.*

<sup>68</sup> Mahapatra, D. “SC: ‘Encroachers have no Right over Public Land: Court Rules Poverty cannot be an Excuse for Squatting’” *Times of India* (10 May 2006), cited in Ramanathan U., *supra* note 54 at 3197.

<sup>69</sup> *See ibid.*

<sup>70</sup> Ramanathan, *supra* note 23 at 3611.

<sup>71</sup> *See Khosla, supra* note 2 at 761.

<sup>72</sup> *C.f. Mahmud, supra* note 40 at 697-698.

analogous to criminals who overrun cities and usurp public resources.<sup>73</sup>

As will be seen in the Canadian narrative that follows, the insecure rights of the urban poor are not unique to the Indian context.

## II. THE RIGHT TO SHELTER IN CANADA

### A. *Tent City versus Victoria City*

Nearly 25 years after *Olga Tellis*, Canada offered its own landmark decision to the jurisprudence of shelter rights.<sup>74</sup> In *Victoria (City) v. Adams* (“*Adams*”), Justice Ross of the Supreme Court of British Columbia considered the right of homeless persons to erect temporary shelter in public parks.<sup>75</sup> The original issue underlying the *Adams* litigation, however, was substantially different from what was deliberated upon and decided at trial. It is worth exploring the narrative leading up to the *Adams* litigation before turning to the reasons of Justice Ross.

On January 16, 2004 (high 7°C, low 1°C)<sup>76</sup>, a number of homeless persons set up tents on the grounds of St. Ann’s Academy in the City of Victoria, British Columbia.<sup>77</sup> While the majority of occupants left the premises after the police arrived, some chose to stay. The most

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<sup>73</sup> Ramanathan, *supra* note 54 at 3197.

<sup>74</sup> It is perhaps worth noting that there were housing rights cases prior to *Adams* which were decided during the formative years of *Charter* litigation and argued under Section 15. In *Alcoholism Foundation of Manitoba v. Winnipeg* (1990) 69 D.L. R. (4th) 697, the Manitoba Court of Appeal struck down a Winnipeg bylaw restricting the establishment of group homes in residential neighborhoods for persons with drug or alcohol addictions. In *Sparks v. Dartmouth/Halifax County Regional Housing Authority* (1993), 119 N.S.R. (2d) 91, a black single mother was issued an eviction order with no reasons given and one month’s notice to vacate. She challenged provincial residential tenancy legislation that excluded public housing tenants from security of tenure provisions as a violation of her equality rights. The Nova Scotia Court of Appeal found that public housing tenants were disproportionately poor, black, single mothers and that their exclusion constituted discrimination under s. 15 of the *Charter*. *C.f.* Jackman M. and Porter B., “Justiciability of Social and Economic Rights in Canada” Pre-Publication Draft for Publication in M. Langford, ed., *Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative International Law* (Cambridge: Cambridge University Press, forthcoming).

<sup>75</sup> *Victoria (City) v. Adams*, 2008 BCSC 1363 (CanLii).

<sup>76</sup> Weather records obtained from “Weather Underground” <<http://www.wunderground.com/>>.

<sup>77</sup> St. Ann’s Academy was the first Roman Catholic Cathedral in British Columbia. The Province purchased the property in 1974 and currently houses the Ministry of Advanced Education. See Sargent, C. “Cridge Park Tent City from the Perspectives of Participants” (2012) M.A. Thesis, University of Victoria. Print.

persistent among them was David Arthur Johnston, a homeless activist and known member of the street community in Victoria. Mr. Johnston insisted that he would continue to sleep outdoors on public access property, and indeed, he continued to do so despite multiple arrests, periods of imprisonment, and altercations with the police. The Provincial Capital Commission had this to say about David Arthur Johnston:<sup>78</sup>

He wants permission to sleep in the open to be closer to God. He does not believe in the use of money. He believes that his patience will win. He would also like his day in court to argue his points-of-view.<sup>79</sup>

Mr. Johnston had his day in court. In fact, he had many.<sup>80</sup> His right to sleep campaign culminated in a series of events during the autumn of 2005. On October 5 (13°C, 8°C), a judge of the Supreme Court of British Columbia issued an injunction ordering Mr. Johnston and the other campers to vacate the property of St. Ann's Academy. Many complied and moved across the street to Cridge Park, a curved lot of land established and maintained by the city. However, Billy Bob McPherson, another camper and homeless citizen, stood his ground.<sup>81</sup>

*Sergeant:* Billy Bob, how are you? I'm going to ask you to remove the structure from around the tree based on the injunction you guys were served with yesterday, and I'm just here to inform you that if you fail to do that you'll be placed under arrest for a breach of a court order. And I'm going to ask you now if you understand what I just said to you.

*Billy Bob:* Sergeant, I understand what you've said to me, and as a matter of conscience, I can't vacate. I'm making a stand here, and we've been moved around enough. I'm sticking around.

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<sup>78</sup> Johnston, D. A. "St. Ann's update- Saturday (Dec. 4th)." *Journal of the Occupation of St. Ann's Academy*. Web. 11 Nov. 2012.

<sup>79</sup> *Ibid.* In response to this document, Mr. Johnston jokingly replied: "Enemies? I have enemies? There may be one or two lazy stubborn children out there that resent me for pointing out their laziness, ya, though I wouldn't call them enemies, I would call them 'me'."

<sup>80</sup> *Ibid.* Mr. Johnston has recorded over 120 encounters with the police and the courts related to his encroaching on publically accessible space. The exhausting number of accounts demonstrates the costs incurred by the public administrative state in enforcing its bylaws. See Johnston, D. A., *supra* note 66 in the entry "St. Ann's update – Sunday, August 26th, 2012: updated police and courts encounters list."

<sup>81</sup> Transcript from *Love and Fearlessness: An Interactive Documentary*. Dir. Andrea McKenzie. Perf. Natalie Adams, Billy Bob McPherson, Et. al., online: <<http://www.loveandfearlessness.com/tentcity.html>>.

*Sergeant:* Okay, I understand that. Is there any point in me standing back for five minutes for you to change your mind, or is that going to be your position five minutes from now as well.

*Billy Bob:* I guarantee that will be my position Sergeant.

*Sergeant:* Okay in that case I'm placing you under arrest for breach of a Supreme Court order. You don't have to say anything to me with respect to that. And anything you do say can be noted down and used as evidence against you. Do you understand all that stuff?

*Billy Bob:* Yeah, I understand.

... *Billy Bob is handcuffed and placed in the police truck.*

*Karma:* That's not fair! All we want is a park. All we want is a place that is already built. You guys don't have to pay for it. It's already built. We have a right to belong somewhere. You're going to arrest him because we're putting our foot down and being heard? That's my sweet brother. You guys take away our family. Our families have already been taken away. Our rights are now being taken away.

...

*Reporter #1:* You can't find a home?

*Karma:* Not affordable no, I mean, you can get a little slum room for \$325, \$350. But I have drug addiction issues. I don't want to do drugs. And there's crack dealers. And there's heroin addicts. And there's prostitutes. God bless them, they're hurting too. But they're doing things that tempt you. Do you want to go and live by a crack dealer with a bunch of roach-infested places? I don't. It's not safe. I've lived in them, I know. I've lived in almost every one that's around.

*Reporter #1:* What's your name?

*Karma:* My name is Karma. My real name is Natalie, but my friends call me Karma.

*Reporter #1:* Last name?

*Karma:* Adams.

... *Karma and the other campers pack up their belongings.*

- Sergeant:* Thank you. And we're more on your side than you think we are.
- Reporter #2:* What did he just say to you?
- Karma:* He said thank you and we're more on you side than you think we are.
- Reporter #2:* Does that help alleviate all the pressure that's on you, knowing that some police—
- Karma:* It's not about pressure on me. I don't have tears because of fear of being arrested. I don't have tears because of pressure that's put on me. It's after 11 years of having to do that exact same thing. Having to pick up your home. How would you like to pack up your house everyday and be told you have to move?
- Reporter #2:* You've been dealing with this for a long time. How do you feel about all the attention that it's being given right now?
- Karma:* Some people have been on the street 20, 30 years. And they still can't think to assign a park, to set up a camp? They say that we're the problem? The government is the problem with their lack of imagination.

Billy Bob McPherson, Karma (Natalie Adams), David Arthur Johnston, and a growing number of campers transformed their occupation of Cridge Park into a "Tent City." At its height, upwards of 70 homeless persons and anti-poverty activists lived and camped within its limits. They set up two kitchens and regularly served meals. Many members of the once fragmented homeless population had taken action and claimed a common space for their community. And like the plight of the pavement-dwellers in India, their cause began to draw widespread media attention. Public dialogue shifted to debate over the decline of social services and the lack of available and affordable shelter options.<sup>82</sup>

On October 14 (13°C, 10°C), the city distributed a notice to Tent City, ordering its residents to vacate the park immediately or face investigation, injunction proceedings, and the confiscation of their personal property. It further advised that the "illegal occupiers" were not

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<sup>82</sup> Citizens took sides. See e.g. MacLeod, A. "The Battle for the Commons" *The Tyee* (20 June 2008), online: <<http://thetyee.ca/News/2008/06/20/Commons>>.

permitted to move themselves or their belongings, “to any other City park or public access way within the jurisdiction of the City of Victoria.”<sup>83</sup> The notice was heard, but the residents would not leave. Consequently, the city commenced enforcement proceedings and sought injunctive relief, which was granted on October 26 (13°C, 4°C). A few days later the police raided Cridge Park and dispersed the homeless back to the streets and alleyways of Victoria.

With the help of Catherine Boies Parker and Irene Faulkner, two lawyers from the Victoria legal community, the homeless mounted a constitutional challenge against the municipal bylaws upon which the injunction rested.<sup>84</sup> In the meantime, the city amended one of its contested bylaws to no longer prohibit “loitering” in public parks. The Attorney General of British Columbia (“AGBC”), intervening on behalf the city, argued that the bylaw in its amended state no longer prevented persons from sleeping in public spaces.<sup>85</sup> Upon clarification of this change, the city indicated that the “operational policy of the Victoria police” was to tolerate sleeping on public property in some circumstances, but to continue prohibiting the use of tents, tarps, boxes, or other structures.<sup>86</sup> The *Adams* litigation thus became focused on the bylaws depriving homeless people of the opportunity to create adequate shelter for themselves on public property.<sup>87</sup> The case was no longer about the right to a Tent City.<sup>88</sup> The *Adams* matter had moved

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<sup>83</sup> *Adams*, *supra* note 64 at para 9.

<sup>84</sup> *Ibid.*, at para 239. Specifically, ss. 13(1) and (2), 14(1) and (2), and 16(1) of the City of Victoria, Bylaw No. 07-059 [*Parks Regulation Bylaw*] and ss. 73(1) and 74(1) of the City of Victoria, Bylaw No. 92-84 [*Streets and Traffic Bylaw*].

<sup>85</sup> *Adams*, *supra* note 64 at para 24.

<sup>86</sup> The extent to which the police did in fact tolerate the poor sleeping on public property is unclear.

<sup>87</sup> Interestingly, the parties in *Adams* agreed that the “current state of the law” was reflected in both the Bylaws themselves as well as the operational policy of the Victoria police. The claim in *Adams* was thus to a certain extent cognizant of this pluralism — the impugned law being a conflux of its codification and its operationalization. One way to understand the right claimed in *Adam* is to expand upon this pluralist principle, for the claim rested on the law *as experienced* by the homeless.

<sup>88</sup> The *Adams* litigation was no longer about the homeless having to pack up their things each morning only to search for another place to rest in the evening. Indeed, the AGBC raised the preliminary objection that the litigation arose under very different circumstances from the current factual matrix under judgement. The real issue, argued the AGBC, was the dismantling of tents, “that had been erected by a group of homeless people, and which went far beyond the mere ‘shelter’ to which the Defendants [claimed] a right” (*Adams*, *supra* note 64 at para

on from its autumnal beginnings in Cridge Park; in the wider public dialogue, *Adams* had grown beyond the limits of Tent City to consider the claims of the homeless to exist and to be tolerated in urban space.<sup>89</sup> In the courtroom, however, the issue had narrowed to the basic right to erect overhead shelter. Thus, at trial, the extraneous claims of the homeless were stripped of their argumentative weaknesses and focused into a judiciable core of *Charter* doctrine.<sup>90</sup> This strategy was, of course, intentional. Ms. Boies and Ms. Faulkner advanced only those arguments with a likelihood of succeeding.

Accordingly, Ms. Adams and the other defendants argued that the prohibition on erecting temporary shelter in public space, *in circumstances where there was otherwise insufficient shelter opportunities*, interfered with their right to life, liberty, and security of the person under s. 7 of the *Charter*, and that this interference was not in accordance with principles of fundamental justice.<sup>91</sup> The British Columbia Civil Liberties Association, intervening on behalf of the homeless defendants, adopted a more value-based approach, arguing that the bylaws infringed upon the dignity and autonomy interests underlying the right to liberty, and prevented the homeless from being free and participating meaningfully in democratic processes.<sup>92</sup> The AGBC counterclaimed that any rights deprivation resulting from the bylaws was not directly caused by state action. The deprivation was instead a result of non-state causes, such as the defendant's

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70). The court ultimately rejected this objection, holding that citizens who believe a law infringes their rights do not need to violate the law in order to have its constitutionality adjudicated. There was sufficient evidence to decide the issue before the court.

<sup>89</sup> Arguments that these claims competed against those of business and other private real property owners undoubtedly informed the scope of the right and remedy afforded in *Adams*. However, these arguments appear to have had their greatest influence on case law after the trial court decision in *Adams* as demonstrated by the reading down of the *Adams* decision and the shift away from rights-affirming rhetoric.

<sup>90</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 [*Charter*].

<sup>91</sup> *Adams*, *supra* note 64 at para 79. Specifically, by interfering with the ability to erect shelter, the bylaws engaged the *life* interest of the defendants by depriving the basic necessities of life. They engaged the *liberty* interest by preventing the defendants from sheltering themselves in public space. Finally, the bylaws engaged the *security of the person* interest of the defendants by imposing severe health risks, thereby interfering with their bodily integrity.

<sup>92</sup> *Ibid.*, at para 80.

lack of access to private real property. Further, the AGBC argued that the claim contemplated the provision of a positive benefit by the City, namely property rights and positive economic support, which do not fall within the negative rights protections of s. 7. Natalie Karma Adams and the other citizens of Victoria waited for a judgement.

B. *The Judgement of Justice Ross*

On October 14, 2008 (13°C, 3°C), three years after Tent City, Justice Ross released her decision. She considered an extensive evidence record: over 1,200 homeless lived in Victoria, a number expected to increase 30% per annum without the provision of additional housing; 40% suffered from mental illness and even more struggled with substance abuse; and only 141 shelter beds were available at the time of trial.<sup>93</sup> Expert testimony indicated that a tent or other form of structure was necessary to sleep safely outside in Victoria's Canadian climate.<sup>94</sup> Anything less could pose significant health risks. Many homeless citizens also took the stand, claiming that available shelters were noisy, unclean, and sometimes violent.<sup>95</sup> The presentation of the evidence provided a strong prediction as to the outcome of the subsequent *Charter* analysis.

Following these findings of fact, Justice Ross' challenge turned to recognizing a *Charter* right and remedy that would respect precedent and withstand an appeal. Therefore, in recognizing a right to shelter, Justice Ross considered the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social, and Cultural Rights* to guide the interpretation of the scope and content of s. 7.<sup>96</sup> More importantly, she relied on the precedent of *R. v. Morgentaler*, *Rodriguez v. British Columbia (Attorney General)*, and *Chaoulli v. Quebec*

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<sup>93</sup> *Adams, supra* note 64 at para 45. The number of available shelter beds expanded to 326 in cases of extreme weather conditions.

<sup>94</sup> *Ibid.*, at para 68.

<sup>95</sup> *Ibid.*, at para 48.

<sup>96</sup> *Ibid.*, at paras 85 – 100.



(*Attorney General*) in evaluating the arguments before her.<sup>97</sup> Both *Morgentaler* and *Rodriguez* supported the proposition that an impugned law need not be the sole or direct cause of the circumstances giving rise to a violation of s. 7. The law was neither the cause of pregnancy nor the cause of terminal illness in these cases. However, the law substantially impeded the rights-bearers from controlling fundamental aspects of their lives, and in this way infringed upon their dignity, freedom, and autonomy as individuals. The same reasoning applied to the impugned bylaws in *Adams*. While not *causing* the circumstances of homelessness, the bylaws nonetheless prevented Ms. Adams and the other defendants from carrying out the necessary life-sustaining act of sheltering themselves on public property.<sup>98</sup>

Strong evidence and analogous precedent lead Justice Ross to find that the prohibition on erecting temporary shelter in public parks exposed the homeless to significant health risks and thus constituted a deprivation of their rights to life, liberty, and security of the person. Turning to whether the infringement was in accordance with the principles of fundamental justice, Justice Ross held that the prohibition was arbitrary and overbroad notwithstanding the objectives of the city in enforcing such a prohibition. This determination was made in the face of arguments by the AGBC that, absent the prohibition, a flood of persons would “flock to the parks to sleep under the shelter of cardboard boxes.”<sup>99</sup> Justice Ross rejected this “imagined hypothetical” as

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<sup>97</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*]; *R. v. Morgentaler* [1988] 1 S.C.R. 30 [*Morgentaler*]; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 [*Chaoulli*].

<sup>98</sup> Justice Ross also rejected the argument of the AGBC that the claim was for a positive benefit. She analogized the factual matrix in *Adams* to the circumstances in *Chaoulli*. Just as the appellants in *Chaoulli* were not seeking an order that the government spend more money on healthcare, the homeless in *Adams* were not asking the government to provide more shelter. The issue before Justice instead rested on the homeless wishing to shelter *themselves*, just as the appellants in *Chaoulli* wished to purchase private healthcare themselves. Evidence in both cases indicated that the government’s attempts to provide healthcare or shelter had been inadequate, so the claimants wished to take it upon themselves to provide these necessities. State prohibitions preventing them from doing so placed their health and security at risk and thus gave rise to the *Charter* claim.

<sup>99</sup> *Adams*, *supra* note 64 at para 228.

“unlikely in the extreme and contrary to the evidence of the complex causes of homelessness.”<sup>100</sup> Finally, to the extent that the bylaws prohibit the erection of overhead protection, they could not be justified as a reasonable limit under s. 1, for the impact of the impugned provisions of the bylaws were disproportionate to any advantages they may have bestowed on society. Given these findings, Justice Ross found that the impugned bylaws were unconstitutional and ordered them “of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter.”<sup>101</sup> Thus, 241 paragraphs later, the Supreme Court of British Columbia found a right for the homeless to sleep under a box.<sup>102</sup>

C. “*Night is for Sleeping, Day is for Resting*”<sup>103</sup>  
*Shelter Rights After Adams*

Three days after the release of the *Adams* decision, five homeless campers were arrested in Beacon Hill Park, a 200-acre municipal property near downtown Victoria.<sup>104</sup> The campers, who had setup a group of tents near a walking path, refused to vacate their shelter when police intervened. Following the decision, the city adopted a policy of enforcing the bylaw during daytime hours only, prohibiting the use of shelters between the hours of 7 a.m. and 9 p.m.<sup>105</sup> John Ducker, the Victoria deputy police chief John Ducker, stated:

It's important to know this judgment does not allow for permanent encampments or a tent city. The *spirit of the ruling* is to allow for the erection of temporary structures overnight

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<sup>100</sup> *Adams, supra* note 64 at paras 228 and 192 respectively.

<sup>101</sup> *Ibid.*, at para 239.

<sup>102</sup> Jackman, M. “*Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?*” forthcoming in : Kent Roach, ed., *Taking Remedies Seriously* (Montréal: Les Éditions Yvon Blais, 2010); see also Young, M. “Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v. Adams*” 164 *BC Studies* 103 (“What does it mean for one of the few victories under the *Charter* for social and economic rights (...) to grant so minimal a protection to so needy and marginalized a sector of Canadian society?” at 111).

<sup>103</sup> Baden, C. (1997) 26.8m X 10.97m X 5.33m (h) concrete, steel City of Victoria, Victoria BC, corner of Douglas and Blanshard Street.

<sup>104</sup> “Victoria Police Clear Tent City, Arrest 5.” *CBC* (17 Oct. 2008), online: <<http://www.cbc.ca/news/canada/british-columbia/story/2008/10/17/bc-victoria-tent-arrests.html>>.

<sup>105</sup> *Ibid.* The city would eventually codify this policy in the *Parks Regulation Bylaw, Amendment Bylaw* (No. 1).

to sleep when there is not shelter space available.<sup>106</sup>

The quick action of the city echoed the growing concern over the *Adams* ruling that absent the bylaws there would be “an inevitable colonization of public spaces with a devastating impact to the economic viability of adjacent areas.”<sup>107</sup> Indeed, these concerns were echoed in the unanimous appeal decision of the British Columbia Court of Appeal.<sup>108</sup> While upholding the judgment of Justice Ross, the court nonetheless emphasized that her reasons did not, “grant the homeless a freestanding constitutional right to erect shelter in public parks.”<sup>109</sup> Importantly, the finding of unconstitutionality was “expressly linked” to the factual finding that the number of homeless people exceeded the number of available shelter space.<sup>110</sup>

The unanimous court thus inferred that if sufficient shelter spaces were available, a blanket prohibition on the erection of overhead shelter might survive *Charter* scrutiny.<sup>111</sup> This inference informed the appellate court’s judgment on the appropriate remedy for this claim. The court recognized that the issue of remedy was particularly difficult in this case, given that Ms. Adams *et al.* did not demonstrate that the impugned bylaws were unconstitutional *in and of themselves*. As their unconstitutionality was connected to the insufficient resources to shelter the homeless, the court only declared the law *inoperative* until the city applied to the Supreme Court for a termination of the declaration. The city would have to prove that the conditions rendering

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<sup>106</sup> “Victoria Police Clear Tent City, Arrest 5.” *CBC* (17 Oct. 2008), online: <http://www.cbc.ca/news/canada/british-columbia/story/2008/10/17/bc-victoria-tent-arrests.html> (emphasis added).

<sup>107</sup> *Adams*, *supra* note 64 at para 173.

<sup>108</sup> *Victoria (City) v. Adams*, 2009 BCCA 563.

<sup>109</sup> *Ibid.*, at para 74.

<sup>110</sup> *Ibid.*, at para 74.

<sup>111</sup> *Ibid.*, at para 122. Here the contextualized and conditional nature of the shelter rights in *Adams* becomes apparent. The British Columbia Court of Appeal took seriously the city’s evidence of the damage caused at Cridge Park and the claims of the homeless to live communally and build another Tent City. These reasons lead the appellate court to hold that the impugned bylaw was not arbitrary. The absolute prohibition on erecting shelter was consistent with the objective to maintain the environmental and social benefits of urban parks. Notwithstanding, the court agreed with Justice Ross that the bylaw was overbroad and thus not in accordance with the principles of fundamental justice.

the impugned bylaw unconstitutional were no longer present.<sup>112</sup> The court further expressed dissatisfaction with the declarations of constitutional invalidity made by the trial court, holding that they did not accurately reflect the law, the findings of fact, or the reasons of the decision.<sup>113</sup> Specifically, the court held that the declaration ought to have referred to “temporary overnight shelter” rather than “temporary shelter” as stipulated in the trial court decision.<sup>114</sup> The court’s effective revision of this declaration respected the choice of legislative policy and responded to the concerns of the majority of private real property owners in the city.<sup>115</sup> Compromise had to be struck. Such is the nature of poor rights.

While the city amended the *Park Regulation Bylaw* to codify its daytime enforcement policy, David Arthur Johnston continued his right to sleep campaign. In February 2009, on a clear winter day, Mr. Johnston and his friend David Michael Shebib set up two cardboard boxes next to city hall. The city issued warnings to the homeless campers, but they chose to ignore them. The city subsequently charged Mr. Johnston and Mr. Shebib with contravening the amended bylaw, which prohibited erecting temporary abodes between the hours of 7 a.m. and 7 p.m. The two homeless campers appeared before Judge Blake of the Provincial Court of British Columbia on February 12 (6°C, 0°C). Judge Blake found that, “the weakness of the defendants’ position, it seems to me, is the essential failure to recognize that in any community there must be accommodation, compromise.”<sup>116</sup> Judge Blake rejected their *Charter* challenge and convicted both accused. Mr. Johnston and Mr. Shebib appealed to the Supreme Court of British Columbia, where Justice Bracken held that although “the s. 7 right under the *Charter* is not limited to

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<sup>112</sup> *Victoria (City) v. Adams*, 2009 BCCA 563., at para 165.

<sup>113</sup> *Ibid.*, at para 155.

<sup>114</sup> *Ibid.*, at para 160.

<sup>115</sup> "Officials Worry over Tent-city Ruling." *The Vancouver Sun* (16 Oct. 2008), online: <<http://www.canada.com/vancouvernews/news/westcoastnews/story.html?id=a064d215-2f7f-4e4b-a05a-d3b5f6199fa3>>.

<sup>116</sup> *R. v. Johnston & Shebib*, [2009] BC Prov Ct of Summary Conviction. Victoria Reg No. 145835-1.

certain hours of each day,” the restrictions imposed by the amended bylaws was a reasonable limit on their s. 7 right to life, liberty, and security of the person, and accordingly justified under s. 1.<sup>117</sup> In particular, he found that more services are available during daytime hours and that overhead shelter may not be necessary in Victoria’s normal temperate climate. Like the members of the judiciary before him, Justice Bracken’s reasons pondered the inevitable conflict between the need of homeless citizens to carry out life-sustaining acts in public and the obligation of government to regulate orderly, aesthetically pleasing public space.<sup>118</sup>

A bench of three justices of the British Columbia Court of Appeal upheld Justice Bracken’s decision but disagreed with his reasoning.<sup>119</sup> Speaking for the court, Justice Donald stated in strong words that, “*Adams* did not create a ‘right’ to do anything.”<sup>120</sup> Justice Bracken had “mistakenly” referred to a right to erect temporary shelters, whereas the effect of *Adams* was only “to prevent interference with the efforts of the homeless in sheltering themselves at night on City property.”<sup>121</sup> Therefore, finding there was no presumed breach of s. 7, Justice Donald asked Mr. Johnston, an unrepresented litigant, to prove how the right was engaged through the restricted daytime enforcement policy. Mr. Johnston claimed that restricting homeless persons from erecting their own dwellings at any time of day violated their dignity and affected their life, liberty, and security of the person. Justice Donald replied that more than a bare statement of Mr. Johnston’s theory was required to take it seriously. Further, “such a submission should be supported by social science and proof of facts demonstrating the harm alleged.”<sup>122</sup> Following the strict reading of *Adams*, Justice Donald upheld the clarification of the previous Court of Appeal

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<sup>117</sup> *Johnston v. Victoria (City)*, 2010 BCSC 1707.

<sup>118</sup> See *ibid.*, at para 56; *Adams* (BCCA), at para 3; *Adams* (BCSC), at para 1.

<sup>119</sup> *Johnston v. Victoria (City)*, 2011 BCCA 400 (CanLii) [*Johnston*].

<sup>120</sup> *Ibid.*, para 10. Contrast with *Olga Tellis*, at para 59 (“...it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon”).

<sup>121</sup> *Johnston*, *supra* note 107 at paras 11 and 13.

<sup>122</sup> *Ibid.*, at para 17.

judgement that, “put beyond doubt the limited scope,” of the original *Adams* decision.<sup>123</sup>

Despite the reading down of the reasons of Madam Justice Ross in *Adams*, the decision continues to reverberate among the homeless across Canada, providing legitimization to their claims to dignity in public space. In Vancouver, on November 22, 2012 (8°C, 2°C), Pivot Legal Society filed a lawsuit on behalf of Clarence Taylor, a 57-year-old man who was forced to live on the streets for three years after he was unable to find safe and suitable housing.<sup>124</sup> Police and city employees approached him over 100 times for sleeping outside. In 2009 alone, he was issued eight bylaw tickets for erecting a tarp in various city parks. The City of Vancouver claims that the *Adams* judgment does not apply to the city. It remains to be seen whether the courts will follow the rights-affirming spirit of Justice Ross’ trial judgment or follow the stricter interpretation of the British Columbia Court of Appeal. Like *Adams*, the Taylor case will likely turn on an extensive evidentiary record of the current capacities of the city to meet the shelter needs of its homeless population. And like *Adams*, the case will also turn on the unnamed parties to the action — the media, the public, city councilors, the police, and community organizations that continue to give shape to the rights and duties negotiated in the city.

#### IV. JUXTAPOSING NARRATIVES

The preceding sections of this article tell two contrasting narratives of the urban poor and their claims to poor rights — to shelter, space, and the most basic conception of human freedom. This section will outline some key points of juxtaposition in the Indian and Canadian narratives. It will first contrast the distinct rights and remedies recognized in these jurisdictions and consider reasons for their differences. It will then argue that despite these differences, shelter rights share

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<sup>123</sup> *Johnston v. Victoria (City)*, 2011 BCCA 400 (CanLii) [*Johnston*], at para 6.

<sup>124</sup> "Vancouver's Ban on Homeless Street Sleeping Challenged." *CBC News*. (22 Nov. 2012), online: <<http://www.cbc.ca/news/canada/british-columbia/story/2012/11/21/bc-homeless-lawsuit.html>>.

an irreducible core in the valid claims of the urban poor.

A. *Rights in Context*

An appropriate starting point is the scope and content of the right to shelter recognized. In both jurisdictions, shelter rights are not absolute. They obtain only under particular conditions. And as case law subsequent to *Olga Tellis* and *Adams* demonstrates, the conditions of shelter rights are not absolute but subject to future court rulings and legislative action. In India, the procedural protections afforded to pavement dwellers are conditional upon whether the pavement dweller was already included in a statutory scheme that provides housing benefits.<sup>125</sup> Public interest concerns may override these conditions and thus the right to shelter is not always guaranteed. In Canada, procedural rights are not so much an issue; the city generally follows and respects notice and hearing requirements in the enforcement of its bylaws.<sup>126</sup> Instead, the focus of the right in the Canadian context is *allowing* homeless citizens to erect shelters on public city property. The right is relegated to the nighttime, limited to the city of Victoria, and conditional upon a lack of sufficient shelter space.

Contrasting these rights reveals that their respective natures are not general or abstract, but are instead practical adaptations to their contexts — social, economic, cultural, political, and legal. In India, shelter rights find compromise in rapidly growing cities. Mumbai continues to promote its commercial viability. Streets must be widened, shops must be sealed, and slums must be cleared.<sup>127</sup> In Canada, shelter rights must be balanced in cities with a view to *preserving* their commercial viability. The right to shelter in *Adams*, for example, attempts to strike a

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<sup>125</sup> The length of occupation of the contested public property is also relevant. As suggested in the first part of this article, the extent to which these procedural protections are guaranteed in practice is unclear. See e.g. Bapat, *supra* note 23, at 2218.

<sup>126</sup> However, similar issues arise when it comes to homeless citizens exercising their procedural rights in formal justice processes. This issue was contemplated by both the trial court and appellate court in *Adams* in deciding *not* to remedy the rights violation with a constitutional exemption.

<sup>127</sup> *C.f.* Roy. A. *Listening to Grasshoppers: Field Notes on Democracy* (Toronto: Penguin, 2009).

compromise between the interests of private real property owners on the one hand and the interests of homeless persons on the other. Daytime in Victoria — the time of commerce — is devoted to tax-paying residents and businesses, when the tourist and service industries depend on the aesthetics of city streets and parks. This compromise preserves the collective willful blindness towards issues of homelessness. The rights of Natalie Adams, David Arthur Johnston, and other homeless citizens extend only insofar as these claimants stay invisible, hiding in the dark where nobody is forced to see them during their morning walk through the park.

The capacities of the state also shape the scope of the right to shelter, although this factor is perhaps not as determinative as some scholars would suggest.<sup>128</sup> Some decisions, such as *Olga Tellis* and *Ahmedabad Municipal Corporation*, hold that the government is under a constitutional obligation to provide alternative land that is reasonably close to a pavement dweller's means to a livelihood. This 'right,' which is a directive principle of state policy, can only take the form of a declarative suggestion and is thereby not a condition precedent to the removal of pavement hutments. Indeed, *Okhla Factor Owners* and *Howrah Ganatantrik* move away from this opinion, finding that even the mere *suggestion* that the government should follow a policy of providing housing does not apply to illegal encroachers on public land. Commentators have reconciled these divergent opinions by framing the Indian approach to social and economic rights as a 'private law model' of adjudication where shelter rights claimants possess what amounts to an individual claim against their government.<sup>129</sup> This model can be contrasted with the approach of the Canadian courts. In *Adams*, the remedial option of using constitutional exemptions to

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<sup>128</sup> For those who emphasize the relationship between social and economic rights and state capacity see e.g. Khosla, *supra* note 2, and also Sunstein, *supra* note 3. Contrast with Mahmud, *supra* note 40 and Buhler, *supra* note 7, who adopt a broader and more contextualized understanding of the forces that shape social and economic rights.

<sup>129</sup> See Khosla, *supra* note 2 at 746 and 765. Indian courts will make good on the claims of individuals who are included in an existing statutory housing scheme to obtain the benefits already promised by that scheme.



adjudicate the shelter rights claims of homeless persons on a discretionary, case-by-case basis was expressly rejected. Such an approach would be uncertain, unpredictable, and unfeasible given the limited means of homeless persons to defend prosecutions against them. Although the downsides contemplated by the Canadian courts are also shared in the Indian context, the private model is perhaps the only feasible option in the complex socioeconomic geography of India. By necessity, the Indian courts embrace this model in their adjudication of individual evictions of settlements on public land.<sup>130</sup>

Consider another point of contrast: the *nature* of the shelter claimed. Pavement dwelling settlements are permanent in character. Residents raise families, run businesses, and build entire communities on lands they are alleged to illegally encroach upon. By contrast, homeless citizens in Canada have no claim to any permanent space in the city. Their existence is necessarily transient. Their shelter is temporary. One factor that may explain this difference is the capacity of the Canadian state to enforce its laws. Compared to India, Canadian cities possess smaller homeless populations, lower general population densities, and lower ratios of homeless citizens to other residents, thereby increasing the enforcement capabilities of the state against the homeless. An encroachment on public land invites a swift and effective response by police, effectively limiting any possibility for homeless citizens to establish a permanent community on public property. In India, however, urban underdevelopment combined with the under enforcement of laws and regulations allows pavement dwellers to remain relatively undisturbed

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<sup>130</sup> Khosla, *supra* note 2 at 746 and 765. By contrast, Justice Ross prefers a more generalized right in *Adams*. She holds that the bylaws are of no force and effect “insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter” (*supra* note 64 at para 239, emphasis added). However, subsequent courts also made this right conditional; the bylaw may be constitutional if sufficient alternative shelter space becomes available. Thus, both the Indian and Canadian approach contemplates the possibility of providing alternative accommodation; both, however, leave this obligation to the state. The extent to which both of these approaches has or will encourage the delivery of more social services is unclear and unfortunately beyond the scope of this article.

on public lands for extended periods of time.<sup>131</sup> In view of these considerations, the claim to shelter in the Canadian context is in some sense more basic, for it is a claim to live, to sleep, and to congregate in a community. It is a claim for a space to exist. The pavement dwellers already possess these conditions, albeit modestly. Their claim is not so much for a space to exist, but for their existing space not to be taken away. During the *Adams* saga, Tent City, which shares much in common with the pavement dweller settlements of *Olga Tellis*, was not even considered an option by judges, advocates, and the broader public. The *Adams* claim was successful *because* the issue was reduced to the most rudimentary claim possible — to protect one’s life and health from the elements. In theory, the right in *Olga Tellis* is more expansive. It contemplates a right to a livelihood, to a means of living, which not only requires a roof over one’s head, but also the permanence of community that makes a livelihood possible.<sup>132</sup>

Other reasons may help explain the difference in scope of the right afforded. Canadian cities, which are relatively small in size and contain a variety of social services, are in stark contrast to the cities of India, which lack basic services for the urban poor. Perhaps there is greater need for the pavement dwellers to live nearby their only available means of income in the sprawling cities in which they reside. Further, the Canadian approach does not protect the *stability* of shelter on public property in the same way as India. The right to shelter in Canada is temporally limited, making any occupation of space temporary. For despite the gradual

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<sup>131</sup> Conversely, the increasing scarcity of land and the deindustrialization of Indian cities lead to the demolitions policies of pavement dwellings in the early 1980s. The need for just *procedures* as a condition to remove pavement settlements thus became all the more important in the Indian context. Perhaps this explains why the court in *Olga Tellis* interpreted the notice provision of s. 314 of the *Bombay Municipal Corporation Act* to allow persons to challenge eviction notices, giving squatters and pavement dwellers a reasonable opportunity to find alternative accommodation in this period of rapidly shifting social geography.

<sup>132</sup> However, it is worth restating *Olga Tellis* does *not* recognize a right to encroach upon the pavement. The point is instead that because of under-enforcement, the pavement dwellers had an opportunity to build their homes and live their lives in public space. The claim in *Adams*, in some sense, is for this very opportunity. This difference raises an interesting and perhaps controversial question: are the pavement dwellers of Bombay in some sense more *free* than the homeless citizens of Victoria?

declination of social welfare protections in Canada, the courts left open the possibility that social services might improve. Sufficient and adequate housing for homeless citizens in Canada could one day become a reality. If this were to occur, the city could apply to the court to have its bylaws rendered re-operative. The Canadian approach thus resists any occupation of public space crystallizing into permanence; homelessness is perhaps still regarded as a resolvable social issue. In India, however, providing sufficient housing for its urban poor population is simply not on the horizon of possibility. For the foreseeable future, private property will remain a privilege, a scarcity, and public lands will remain the only option for nearly half of India's urban citizens.<sup>133</sup>

There are undoubtedly more points of comparison in addition to those mentioned here—similarities and differences between these two nations further contextualize the shelter rights that exist within them. Admittedly, contemplating the scope and content of these rights requires positing *reasons* for their particular nature, and this can be a speculative undertaking. However, the process of comparison and juxtaposition does reveal the variance and complexity of social and economic rights. The comparative process shows how such rights are pragmatic adaptations to the social conditions in which they arise. The next section argues that these social conditions are not confined to the resources and capacities of the state. For if a right to shelter is inextricably tied to its factual context, where does this leave the role of the rights claimant? Where in the balancing equation of rights do the claims of the urban poor find purchase?

## B. *Claims in Context*

Another lens of juxtaposition is to compare the extent to which the rights afforded in

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<sup>133</sup> This has not stopped the country from finding creative solutions to this issue. Pavement dwellers *have* been provided with alternative lands appropriated by the government and allocated to them. Canada's housing policies for homeless persons take on a much different form. The proposal to allocate, say, a public park within a Canadian city for the specific purpose of providing homeless persons a space to live in would likely be lambasted. It is not a viable solution in the context of the Canadian cultural imaginary.

India and Canada accurately reflect the respective *claims* of rights-bearers. The preceding Indian and Canadian narratives suggest that the rights afforded fall short of these claims. Many rights do. Justice Ross could not coordinate a sophisticated housing policy. She could not designate a space within the city, as Natalie Adams suggested, for the homeless to belong. Nor could Chief Justice Chandrachud guarantee the security of all pavement dwellers on public lands. Of course, neither judge could fix the problems of poverty. There are legitimate reasons why it might be beyond the capacities of the state and the functions of the court to do so.

However, there is another reason explaining the shortfall between the claims of the urban poor and the rights afforded to them: the claims of the poor are not given equal concern or legitimacy. The lack of voice, recognition, and representation of the urban poor in political communities perpetuates the underperformance of the very rights to which they lay claim. The preceding narratives from India and Canada share in this deficit between rights claimed and rights afforded. The legal regimes in which the poor challenge state action taken against them are designed against their favour, prioritizing private property and economic viability.

Yet these narratives also reveal ways in which the claims of the urban poor could be given purchase. For one, the *legal* actions in both *Adams* and *Olga Tellis* would not have been brought at all if not for the community organizations and individuals who provided assistance to the claimants. Secondly, the media in both narratives helped shape collective perspectives of poverty by stimulating public debate by making visible issues that would otherwise remain unknown. Lastly, at least in some cases, the court harnessed the power of rights-affirming rhetoric and provided a legitimizing function to the claims of the urban poor.<sup>134</sup>

There is, however, a cautionary tale to these examples. As the litigation strategy in

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<sup>134</sup> In the Indian context, see Khosla, *supra* note 2 (“[t]he law has the potential to play a crucial part in changing social meanings” at 760).

*Adams* suggested, the appropriation of the claims of Natalie Adams *et al.* by the counsel litigating on their behalf most certainly changed the nature of these claims. In India, NGOs have been criticized for supplanting the role of customary dispute resolution processes and commandeering the “authentic voice” of the poor.<sup>135</sup> Similarly, the media have a well-documented distortive force when reporting issues and presenting opinions.<sup>136</sup> Even myself analyzing the rights and claims of the others from the privileged perspective of a law student, is an act of appropriation, and, inevitably, an act of distortion.

It is thus important to keep in view the ultimate authors of the Indian and Canadian narratives. The pavement dwellers and residents of Tent City are the original and vital source of their claims to shelter. In this sense, I hope my normative postulation — that our rights discourse should be reframed to reflect the primacy and agency of persons — now rings true and clear. This discursive reframing understands persons not as objects of state obligation but as subjects who are authors of their own valid claims, and co-authors of the rights negotiated through these claims. In *Adams*, for example, the residents of Tent City had been “moved around enough.”<sup>137</sup> As Justice Ross indicated, their claim to shelter, to be left undisturbed on public property, is distinct from a claim for the state provision of shelter. Regardless of whether this distinct claim is a ‘positive’ or ‘negative’ right, the claim *itself* is premised on meaningful participation in determining this right. Such a premise contemplates the ability of the residents of Tent City to negotiate their valid claims with the competing claims of others. This is also true of the pavement dwellers that object to the demolition of their property and the displacement of their

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<sup>135</sup> See Mahmud, *supra* note 40 at 709.

<sup>136</sup> The role of the media in reporting judicial decision-making is also worth noting. For as some cases in the Indian and Canadian narratives suggest, just as the normative parlance of the judiciary can be rights-affirming, it can also be rights-damaging, furthering stereotypes and perpetuating the discrimination of persons in poverty. In this way, judicial rights discourse, whether positive or negative, can crystallize norms of public dialogue.

<sup>137</sup> McPherson, B.B., quoted in “Love and Fearlessness,” *supra* note 76.

communities. Their claims are premised on the ability to participate in deliberative processes with other members of society to mediate disputes over the space in which they live.<sup>138</sup>

The process of negotiating claims promotes a mutually acceptable justification of why benefits and burdens in society must be distributed in a particular way. Some justifications are provided in the preceding narratives. Judges refer to such things as the public interest and illegality in order to justify laws that force people to abandon their homes and dismantle their shelters. Sometimes these reasons are sound — overpasses must be built, parks must be made safe, streets must be kept reasonably clean. I do not dispute the importance of these public interest concerns. If anything, I seek to appreciate their complexity by contextualizing the conflict that arises when public concerns confront the claims of the urban poor. However, my basic argument is that our justifications — not only from governments, but from all members of society — must show equal concern and respect to the individuals who stand to lose the most from our decisions.<sup>139</sup> Decisions derive legitimacy from hearing and giving consideration to the valid claims of others. For a society to have moral title over its collective decisions, every person, in navigating their lives and relationships, is entitled to have their claims heard and considered equally.

As the preceding narratives demonstrate, the processes negotiating the rights, duties, costs, and claims of society are not limited to the formal justice system. These negotiations permeate all aspects of social life. They range from political advocacy on a national scale to the personal interactions we have with one another on a street corner. The very act of recognizing

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<sup>138</sup> Such processes are not limited to the justice system. Although the court in *Olga Tellis* formalizes the precept of participation by affording pavement dwellers procedural rights, such safeguards are meaningless if claimants are unable to access justice mechanisms to be heard in decision-making procedures, or if the possible outcomes of these procedures do not correspond with their initial claims. It is thus suggested that meaningful participation ought to be *broader* and begin *prior* to resolving rights disputes through the formal justice system.

<sup>139</sup> *C.f.* Dworkin, R. "Justice for Hedgehogs" Carnegie Council for Ethics in International Affairs (New York, Speech, 6 Dec. 2011), online: < [http://www.carnegiecouncil.org/people/data/ronald\\_dworkin.html](http://www.carnegiecouncil.org/people/data/ronald_dworkin.html)>.

the claims of fellow citizens as valid as any other, in all contexts of human life, is the first step towards promoting a more inclusive *polis* and enabling the participation of the urban poor in public decision-making processes.<sup>140</sup> Participation respects the grounds of *disagreement* on which competing claims rest and seeks to increase *agreement* between claims and the decision made. Participation also invites creative resolutions to disagreements otherwise characterized as:

...*inevitable* conflict[s] between the need[s] of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets.<sup>141</sup>

While compromise must be struck, rights needn't be poor. Nor must conflict be inevitable. Perhaps there are other ways to negotiate these disagreements. Perhaps we can discover some of these ways by listening to those who have the greatest stake in how we share our commons. We might learn that some claim something much more basic than the provision of state benefits or the protection against adverse state action. These claims are not so easily mapped onto categories of positive, negative, social, or economic rights. For some claim only the dignity to be a part of the same world as others. The agency of these individuals should not be consigned to the peripheries of social interaction and public decision-making. Their claims should instead be central to the processes of community.

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<sup>140</sup> In doing so, legislators may find ways to resolve the claims of the urban poor and other stakeholders who, as equal citizens, share public spaces. More generally, inclusion fosters tolerance and social acceptance. The relationship between decision-making processes in the public sphere and the role of the courts in enforcing rights is unfortunately beyond the scope of this paper. However, it is a subject I am very interested in exploring in the future. For the purposes of this paper, suffice it to say that meaningful change for the homeless is won not only in the courtroom, but in the community. For an example of such an initiative in Victoria, see *Committee To End Homelessness In Victoria*, online: <<http://ctehv.wordpress.com>>. The website states:

“We bring together homeless, formerly homeless, and housed allies to find solutions and press for change. We challenge the actions of our politicians, bureaucrats, service providers and the police. We listen to the concerns voiced by people living on the streets and others who experience homelessness in Victoria, and we promise to take action by bringing their concerns to the attention of those who can act and make a positive difference in their lives.”

<sup>141</sup> *Pottinger v. City of Miami*, 810 F. Supp. 1551 at 1554 (S.D. Fla. 1992), quoted in *Adams*, *supra* note 64, at para 1 (emphasis added).

## V. CONCLUSION

The Indian and Canadian narratives have much to teach us. They teach us that a right to shelter is not exclusive to the obligations of a state or to the abstract prescriptions of a governing constitution. It is both broader in meaning and more plural in content. Such a right finds expression in the interactions of individuals who negotiate the tensions of dynamic social and legal orders. The homeless citizens in *Adams*, for instance, are granted a *Charter* right that disappears at dawn. The pavement dwellers in *Olga Tellis* are guaranteed a constitutional right but deemed illegal encroachers on public land. A just resolve of these tensions will not be possible without first enabling these citizens to have their claims heard, respected, and legitimized. As equal citizens, they must be given voice within the social and political realities in which they are a part. In our complex debates about the nature of rights, the roles of institutions, and the obligations of the state, it may be useful to step back for a moment and remember whom these debates are ultimately about. By taking the *claims* to social and economic rights seriously, we may find ways of guiding such rights towards their transformative aspirations. Only then will we find a just space within the law, and within the city, for the valid claims of the urban poor.



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