

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

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Claiming Poor Rights:

rights violations are too weak or unfeasible.² Others argue that the judiciary lacks the competence to adjudicate such rights — enforcing a right to shelter, for example, is far

making possible the valid claims of persons,

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.”¹⁰ 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

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

II. THE RIGHT TO SHELTER IN INDIA

A. *The Pavement Dwellers*

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.¹⁹ These pavement dwellers, alongside the concerned citizens who supported their cause, petitioned the Bombay High Court to stop the mass demolitions.²⁰

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

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;²² however, “how well-founded the argument regarding the *existence and scope* of the right claimed by the petitioners is another matter.”²³ In determining the existence and scope of the rights claimed, t

journalists, and mobilized pavement dwellers who made the issue one of national importance.⁴¹

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

the Supreme Court's recommendations to make demolitions humane by avoiding them during monsoon season and providing alternative accommodation for those evicted.⁴⁷ Some demolitions resulted in the confiscation of the personal belongings of the pavement dwellers while others resulted in outright violence.⁴⁸ Thus, while any decision to demolish a pavement dwelling

Builders v. Narayan K Totame (“*Shantisar Builders*”).⁵³ 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.⁵⁴ 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.⁵⁵ 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

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

measure.”⁶⁰ 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*”).⁶¹ 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.”⁶² 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.”⁶³ The court held that the policy served no social purpose since the criteria for entitlement, trespassing on public land, was illegal.⁶⁴

Justice B.N. Kirpal’s reasons in the Supreme Court decision of *Almitra Patel v. Union of India* (“*Almitra Patel*”)

domestic effluents, or in slums with no care for hygiene.”⁶⁶ According to Justice Kirpal, rewarding t

analogous to criminals who overrun cities and usurp public resources.⁷³

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

persistent among them was David Arthur Johnston, a homeless activist and known member of the street community in Victoria. Mr. Johnston insisted that h

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 livē (D) -0.2 (o) ore want tc('s-12.6 (l)(?) 0.

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

permitted to move themselves or their belongings, “to any other City park or public access way within the jurisdiction of the City of Victoria.”⁸³ 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

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.⁸⁹ 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

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.

(*Attorney General*) in evaluating the arguments before her.⁹⁷ Both *Morgentaler* and *Rodriguez*

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“unlikely in the extreme and contrary to the evidence of the complex causes of homelessness.”¹⁰⁰ 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.”¹⁰¹ Thus, 241 paragraphs later, the Supreme Court of British Columbia found a right for the homeless to sleep under a box.¹⁰²

C. “*Night is for Sleeping, Day is for Resting*”¹⁰³
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.¹⁰⁴ 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.¹⁰⁵ 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

¹⁰⁰ *Adams, supra* note 64 at paras 228 and 192 respectively.

¹⁰¹ *Ibid.*, at para 239.

¹⁰² 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).

¹⁰³ Baden, 0 0.24 .08 TJ ET Q/TT1 1 41 0 0Tmity)note 60.2 (e) 0.2c.)

the impugned bylaw unconstitutional were no longer present.¹¹² 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.¹¹³ Specifically, the court held that the declaration ought to have referred to “temporary overnight shelter” rather than “temporary shelter” as

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. 1.¹¹⁷ 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

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

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.¹²⁸ 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.¹²⁹ This model can be contrasted with the approach of the Canadian courts. In *Adams*, the remedial option of using constitutional exemptions to

¹²⁸ 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.

¹²⁹ 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.

on public lands for extended periods of time.¹³¹ 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.¹³²

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

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;q 0.20t

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

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.¹³⁵ Similarly, the media have a well-documented distortive force when reporting issues and presenting opinions.¹³⁶ 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 objects — 0.2 (t) 0.2 (a) 024 2 () -.g(hors) -0

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.¹³⁸

The process of negotiating claims promotes a mutual

the claims of fellow citizens as valid as any other, in all contexts of human life, is the first step towards promoting

V. CONCLUSION

The Indian and Canadian narratives have much to teach us.

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