

# AN INTERSECTIONAL APPROACH TO HOMELESSNESS: DISCRIMINATION AND CRIMINALIZATION

Alice Giannini\*

---

\* Exchange student at the University of Stockholm, School of Law. This paper was written as the final exam for the course “Equality Law”. Last year Master student at the University of Bologna, School of Law.

*In its majestic equality, the law forbids  
rich and poor alike to sleep under bridges,  
beg in the streets, and steal loaves of bread.*

*Anatole France (1844-1924)*

## **TABLE OF CONTENTS**

1.	An intersectional approach to discrimination.....	5
2.1.	The complexity of homelessness.....	7
2.2.	The intersectionality of homelessness: stereotypes, stigma and social profiling.....	9
2.3.	Quality of life and anti-homelessness ordinances.....	12
3.	Conclusion.....	14
	Bibliography.....	17

## **Abstract**

The purpose of this essay is to address discrimination against homeless people. First of all, the theory of intersectionality will be explained and then applied as a method of analysis. The complexity of defining homeless will be tackled, focusing on the difficulties encountered when approaching this concept. Notions such as protected ground and immutability of personal characteristics will be discussed. Then, an intersectional approach to homelessness will be outlined. Different cases settled by the Supreme Court of Canada will be used to support this approach. Intersectional discrimination is a rather new theory which has not yet been applied by many courts and tribunals but Canada has proven to be a vanguard in this area. For this reason, Canadian case law has been chosen as the main example in this research. Phenomena of stereotyping, prejudices and social profiling connected to homelessness will be described. In addition, an inquiry on homelessness cannot be conducted without looking at the representation different minority groups within the homeless population and therefore this aspect will be shortly dealt with. To continue with, different laws and other legal sources concerned with criminalizing specific conducts against public order will be analyzed applying the outlined intersectional method. In specific, this work will concentrate on quality of life regulations and anti-homeless regulations. What the author will argue is that, once it is established that homelessness is a ground worthy of protection, this kind of legislations results in direct and indirect discrimination. In conclusion, the arguments in favor of including homelessness or social condition as a ground of discrimination will be laid out, with reference to Canadian, European and international law sources. Due to the broadness of the topic, this essay does not aim at being a comprehensive study but rather at trying to answer these questions: how can we consider homelessness as a ground of discrimination? What are the most common ways in which this distinctive kind of discrimination is perpetuated?

## 1.2 An intersectional approach to discrimination

The concept of intersectional discrimination was first introduced in the 80's by Kimberlé Crenshaw, Afro-American activist and legal scholar. Crenshaw analyzed different cases which dealt with black women discrimination both in the labor market<sup>1</sup> and in the area of domestic violence.<sup>2</sup> She argued that a single-axis model of identity<sup>3</sup> failed black women because their experience of discrimination was unique and therefore could not be captured by looking at gender and race separately. Criticizing the idea of identity politics, Crenshaw stressed the potential of a theory which could explain how different identities interact to create complex identities<sup>4</sup>.

One of the main issues with conceiving discrimination law as focused on one ground at the time is that it neglects the role that *power* plays in relationships. On the other hand, early approaches to intersectionality as the Crenshaw one, which focused on the creation of new groups such as black women, “to reflect specific intersectional experiences”<sup>5</sup>, were subject to the criticism of creating the possibility of an excessive proliferation of protected categories and subjects.

According to more recent intersectionality theories, which will be applied in this analysis, discrimination needs to be conceived as *structural* i.e. “concerned with relationships of power in order to determine who to protect and how”<sup>6</sup>. The focus of this method of analysis is not on the personal characteristic shared by a group of individuals but on *society's reaction* to the person. The uniqueness of this kind of approach is that importance is given to the so called “historical disadvantage” which was experienced by a group of people. Furthermore, the advantage of this method is that it does not require that people identify themselves into “rigid compartments or categories” and that it acknowledges that discrimination many times can be “systemic, environmental and *institutionalized* [*italics added*]”<sup>7</sup>. Applying an intersectional method of investigation allows us to link discrimination to factors belonging to the social environment, such as homelessness, which are not directly

---

<sup>1</sup>Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum*: 1989, no. 1: Article 8

<sup>2</sup> Kimberle Crenshaw, "Mapping The Margins: Intersectionality, Identity Politics, And Violence Against Women Of Color", *Stanford Law Review* 43, no. 6: 1241

<sup>3</sup> Based on race, gender sexual orientation, etc.

<sup>4</sup> Ben Smith, "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective", *The Equal Rights Review* 2016: 74

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup>Ontario Human Rights Commission, *An Intersectional Approach To Discrimination*, 2002. Available at: <http://www.ohrc.on.ca/en>

covered by most discrimination law sources. A ground of discrimination must then be understood as a channel “to describe different power relationships”<sup>8</sup>.

Canadian Courts have proved to be a vanguard in using an intersectional approach to discrimination. *Egan v. Canada*<sup>9</sup> was a landmark case decided by the Canadian Supreme Court. It recognized sexual orientation as a prohibited ground of discrimination under article 15 of the Canadian Charter of Rights and Freedoms<sup>10</sup>. When delivering the majority opinion, Judge La Forest J stated:

As this Court has frequently acknowledged, the essence of discrimination is its impact, not its intention ... *We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects...* By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences...More often than not, *disadvantage arises from the way in which society treats particular individuals*, rather than from any characteristic inherent in those individuals. [*italics added*]<sup>11</sup>

The aforementioned case was not the only one where the topic of intersectionality was touched upon by Canadian Courts. In *Law v. Canada*<sup>12</sup>, the Supreme Court stated that “there is no reason in principle ... why a discrimination claim posing an intersection of grounds cannot be understood as analogous to<sup>13</sup>, or a synthesis of, the grounds listed in s.15”<sup>14</sup>. In *Corbière v. Canada*<sup>15</sup>, judge L’Heurex-Dubé stated that, when the Court’s inquiry is to recognize whether a ground of discrimination can be considered as analogous or not, stereotyping, prejudice or denials of human dignity and worth need to be considered. She

---

<sup>8</sup>Sandra Fredman, *Intersectional Discrimination In EU Gender Equality And Non-Discrimination Law* (Luxembourg: Publications Office, 2016), 8

<sup>9</sup> *Egan v. Canada* 1995 2 S.C.R. 513. SCC.

<sup>10</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11

<sup>11</sup> *Egan v. Canada*, see *supra* n.9, at 551-2

<sup>12</sup> *Law v. Canada* 1999 1 S.C.R. 497. SCC. The case dealt with pension benefits and discrimination on the ground of age.

<sup>13</sup> In Canadian equality case law, the concept of analogous grounds of discrimination has been used to extend protection against discrimination based on grounds that are not enumerated in the Canadian Charter.

<sup>14</sup> *Supra* n. 12 at 554-5

<sup>15</sup> *Corbière v. Canada* 1999 2 S.C.R. 203. SCC. This case dealt with discrimination experienced by Aboriginal people who don’t live in a reserve.

affirmed that the Court should recognize “that personal characteristics may overlap or intersect” and that grounds of discrimination should “reflect changing social phenomena or new or different forms of stereotyping or prejudice”<sup>16</sup>.

To conclude, the intersectional method is the best fit for this investigation because it requires an analysis of *contextual factors*. A contextual analysis entails: “[E]xamining the discriminatory stereotypes; the purpose of the legislation, regulation or policy; the nature of and/or situation of the individual at issue, and the social, political and legal history of the person’s treatment in society”<sup>17</sup>. These elements will be tackled in the following paragraphs.

## 2.1. The complexity of homelessness

Homelessness is a multifaceted concept and number of difficulties might arise when it is approached. It is hard to refer to homelessness as a ground of discrimination if we consider a traditional, single ground approach to discrimination as the one used today by most legislators and national/international courts. In his book “A theory of discrimination law”<sup>18</sup>, Tarunabh Keithan builds the architecture of discrimination law on 3 elements: protectorate, duty bearers and duties. The protectorate is a group of individuals which is classified as such by specific characteristics called grounds. The protected ground, in order to be called so, must possess two requirements: the ground must be a personal characteristic which classifies persons into groups with a significant advantage gap between them and it must be immutable or constitute a fundamental choice<sup>19</sup>.

Definitions of homelessness vary between different countries and scholars or policy makers. In a strict and rather simplistic interpretation, homelessness can be described as lack or inadequacy of housing arrangements<sup>20</sup> but, in fact, it is a much more complex concept. If we take into consideration the so called “personal ground condition”<sup>21</sup>; it can be argued that this condition is missing if we look at the diversity of individuals which lack an adequate housing arrangement. Indeed, in the judgment of *Tanudjaja v. Canada*<sup>22</sup>, judge Lederer J of the Ontario Superior Court of Justice dismissed an application that claimed a violation of

---

<sup>16</sup> *Ibid.* at 253

<sup>17</sup> *Supra* n. 7 at p.28

<sup>18</sup> Tarunabh Khaitan, *A Theory Of Discrimination Law* (Oxford: Oxford University Press, 2015), 47-89

<sup>19</sup> *Ibid.*, p. 50

<sup>20</sup> Marie-Eve Sylvestre and Céline Bellot, ed. Martha Jackman and Bruce Porter, “Challenging Discriminatory and Punitive Responses to Homelessness in Canada”, *Advancing Social Rights in Canada*, Irwin Law 2014. Available at SSRN: <https://ssrn.com/abstract=2484975>

<sup>21</sup> *Supra*, p.50

<sup>22</sup> *Tanudjaja v Canada* (Attorney General), 2013 ONSC 5410

section 7 and section 15 of the Canadian Charter of Rights and Freedoms<sup>2324</sup> caused by changes in legislation which gave rise to an increase in inadequate housing and homelessness. He argued that homelessness could not be considered as an analogous ground of discrimination because it lacked “definability”<sup>25</sup> and therefore it was not fit to indicate who belonged to that specific group and who did not. Thus, if we look at a “traditional” ground of discrimination such as race, it can be argued that it lacks definability as well as there are no specific requirements (such as a specific level of dark skin or an ethnic background) set in order to qualify as a member of the group<sup>26</sup>. Therefore, the heterogeneity of homelessness cannot be considered an obstacle to consider it as a protected ground. Homelessness can be rightly addressed only if it is conceived as a multi-dimensional concept: “[R]ights violation, social exclusion and inclusion, poverty and discrimination”<sup>27</sup> must be included. As stated by the Canadian Homelessness research network:

Homelessness describes the situation of an individual or family without stable, permanent, appropriate housing, or the immediate prospect, means and ability of acquiring it. It is the result of systemic or societal barriers, a lack of affordable and appropriate housing, the individual/household’s financial, mental, cognitive, behavioral or physical challenges, and/or racism and discrimination<sup>28</sup>.

Homelessness cannot be defined in terms of immutability, either. It is a rather “fluid”<sup>29</sup> concept. It is not an innate characteristic of the individual and the nature of the housing condition or the duration of the homelessness itself may vary in time. It includes different physical living conditions which can be divided into different typologies: 1) “Unsheltered”: people who are unsheltered or absolutely homeless and therefore are living in the street or in a place which cannot be defined as adequate for a human habitation; 2) “Emergency Sheltered”: people who live in emergency shelters which could be either

---

<sup>23</sup> *Supra* n. 10

<sup>24</sup> Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 15: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>25</sup> Should homelessness be an analogous ground? Clarifying the multi variable approach to section 15 of the charter

<sup>26</sup> *Ibid.*

<sup>27</sup> *Supra* n. 20, p. 5

<sup>28</sup> Canadian Observatory on Homelessness, “Canadian Definition of Homelessness”, 2012.

Homeless Hub: [www.homelesshub.ca/homelessdefinition/](http://www.homelesshub.ca/homelessdefinition/)

<sup>29</sup> *Ibid.* p. 1



temporary or occasional or permanent; 3) “Provisionally accommodated”: people who are staying in an accommodation which is transitional and temporary (including prisons or mental health institutions); 4) “At Risk of Homelessness”: people who are not homeless yet (strictly speaking) but who are living in a precarious economic and housing situation or in an inadequate one because it lacks safety or is unaffordable or overcrowded<sup>30</sup>.

## **2.2. The intersectionality of homelessness: stereotypes, stigma and social profiling**

Having addressed the difficulties or critics which might arise when dealing with homelessness as a ground of discrimination in a “traditional approach” , it is now possible to look at homelessness from an intersectional point of view. Intersectionality has been defined as an “intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone.”<sup>31</sup> What homeless people have in common is that they are all been subjected to a unique kind of discrimination characterized by social exclusion, social profiling, historic stigma and prejudice. They have always been placed last in the entire social, political and legal structure of our society. The focus of courts and tribunals when they intervene on a law or a government policy should be on the effects of that provision on a group of individuals based on the position of the place of that group in our society.

Another problem related to homelessness and intersectionality is that “*marginalized groups are disproportionately represented in the homeless population, and are therefore, disproportionately targeted by ordinances that criminalize homelessness. [italics added]*”<sup>32</sup> If we look at statistics, an estimated 3.5 million people were homeless in the United States in 2014 and 42% of them were African American, despite being only 12% of the population overall and 20% of them were Hispanic, despite being only 12% of the population overall. 20-40% of homeless identify as LGBTW compared to only 5-10% of the overall population. Approximately 30% of the homeless population has a mental disability.<sup>33</sup> This phenomenon of overrepresentation does not apply only to the United States. If we look at mental health,

---

<sup>30</sup> *Ibid.*

<sup>31</sup> Mary Eaton, “Patently Confused: Complex Inequality and Canada v. Mossop” , *1 Rev. Const. Stud.* 203, 1993-1994, p. 229

<sup>32</sup> Kaya Lurie and Breanne Schuster, ed. Sara K. Rankin, *Discrimination At The Margins: The Intersectionality Of Homelessness & Other Marginalized Group*, Homeless Rights Advocacy Project, Seattle University School of Law, 2015.

<sup>33</sup> *Ibid.*

for example, around 30% of the homeless population in Europe (150,000 people) also experiences severe, chronic mental illness<sup>34</sup>.

In a psychiatric study conducted in Toronto (home to the largest homeless population in Canada)<sup>35</sup>, researchers found how discrimination according to homelessness was perceived as qualitatively different than discrimination on the ground of race. The stigma of being homeless causes deep shame as in homelessness is “situational and subject to at least some potential for change and ... can be hard to hide from others”.<sup>36</sup> When the stigmatized identity is perceived by the public as “to some extent controllable ... group based discrimination has a more harmful effect on wellbeing than discrimination directed against those with an uncontrollable stigma (such as race or gender)... since housing status is perceived as somewhat under an individual’s control ... the homeless are often considered to be responsible for their lack of adequate housing<sup>37</sup>”.

The result of the overrepresentation of marginalized group in the homeless population is a unique kind of discrimination that occurs as a consequence of the intersection of different types of disadvantages. It is unique because not only it is perceived as legitimate but also because it is conducted by a much higher number of individuals and this makes homeless different from every other minority group. Homeless are discriminated from their own friends and family as well as from the mainstream<sup>38</sup>.

Punitive responses to homelessness have always been based on negative stereotyping and prejudices. It is possible to identify three distinct sets of beliefs which are wrongly connected to homeless: the “moral depravation” belief, where homeless are portrayed as morally inferior lazy and dishonest individuals; the “choice” belief, according to which homeless are blamed for their own misfortune and finally the “criminality” belief, which entails that homeless are criminals or potential serious offenders which should be repressed or confined<sup>39</sup>. The issue of freedom of choice and the question of immutability has been partially addressed in the previous section of this essay but it can be analyzed further. In general, it can be affirmed that choices and options are extremely limited when one is experiencing homelessness. Life cannot be described as a dichotomy between choice and

---

<sup>34</sup> Mental Health Europe, *Access to services by people with severe mental health problems*, 2013.

<sup>35</sup> Zenger et al., Differential experiences of discrimination among ethnoracially diverse persons experiencing mental illness and homelessness, *BMC Psychiatry* 2014, 14:353

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

<sup>37</sup> Melissa Johnstone et al., Discrimination and wellbeing amongst the homeless: the role of multiple group membership, *Front. Psychol.* 2015, 6: 739, doi: 10.3389/fpsyg.2015.00739

<sup>38</sup> *Ibid.*

<sup>39</sup> *Supra* n.20, p. 22

constraint since this does not include how our actions are embedded in social structures and interactions. The criminalization of homeless conducts led by governments in order to punish them and thus encouraging them to change their condition results only in further exclusion rather than in deterrence<sup>40</sup>. The idea of homelessness by choice is more a myth than a proven fact.

Social profiling is generated by an action taken against an individual based on the fact that, according to the individual's appearance, this appears to be a member of an identified group of people. Homeless are victims of social profiling based on their neglected appearance or on the status of their personal hygiene or on their clothing. Social profiling can be seen in broad interpretations of regulations resulting in criminalization of homelessness.

In conclusion, due to stigma, stereotypes and social profiling, homelessness involves much more than the absence of housing. It becomes an “all-encompassing social label for individuals” which defines them in a way that is socially constructed and difficult to change as in “every part of the society perceives and treats a person differently once they are homeless<sup>41</sup>.”

### **3.1. Quality of life and anti-homelessness ordinances**

At this point of the analysis, it is possible to apply intersectionality as a general theory of identity in order to examine the underlying structures of inequality which emerge from the criminalization of homelessness. It is possible to distinguish different types of regulations which affect homelessness: anti-homelessness ordinances and quality of life ordinances.

First of all, anti-homeless ordinances are those laws which prohibit activities such as standing, sitting and resting in public spaces and other daytime activities; sleeping, camping and lodging including in vehicles and other nighttime activities; begging and panhandling and food sharing<sup>42</sup>. Throughout the whole world, regulation of public places has increased. In Canada, local authorities have adopted regulations which prohibit antisocial behavior in public places such as parks, sidewalks and subway stations<sup>43</sup>. In a survey conducted by the National Law Center on Homelessness & Poverty<sup>44</sup>, 34% out of 187 cities in the United States prohibited camping in public and 57% prohibited camping in particular public spaces.

---

<sup>40</sup> *Ibid* . p. 23

<sup>41</sup> *Ibid* p. 24

<sup>42</sup> Chris Herring and Dilara Yarbrough, *Punishing the Poorest: How the Criminalization of Homelessness Perpetuates Poverty in San Francisco*, 2015, 6. Available at SSRN:<https://ssrn.com/abstract=2620426>

<sup>43</sup> *Supra* n. 20, p.16

<sup>44</sup> National Law Center on homelessness & Poverty, *No Safe Place : the Criminalization of Homelessness in U.S. Cities*, 2014. Available at: [homelesshub.ca](http://homelesshub.ca)

27% of these cities prohibits sleeping in particular public places, 76% prohibits begging in particular public spaces, 53% prohibits sitting or lying down in particular public places and so on. Similar ordinances can also be found throughout Europe<sup>45</sup>. The problem of this kind of regulations is that they criminalize conducts which can be considered as life sustaining for the homeless population: public spaces are the only ones they can use, hence they are directly discriminated. Since they lack a private space, “homeless people are forced to meet their most basic needs in public spaces. They are highly dependent on being able to use such spaces, yet at the same time they are vulnerable to discriminatory treatment in them.”<sup>46</sup> Finally, these laws are highly ineffective and only result in creating more obstacles for homeless to integrate. The result is that homeless people are overrepresented in prison population not because they display higher criminal behaviors but because their survival strategies are being criminalized.

Numerous examples of express laws which prohibit activities of people experiencing homelessness can be found throughout a variety of law legal systems. In 1999, the province of Ontario (Canada) adopted the *Safe Streets Act*<sup>47</sup>. This Act prohibits solicitation in an “aggressive manner” and of a “captive audience”. Solicitation is defined as the action “to request, in person, the immediate provision of money or another thing of value, regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means”. In England, the Vagrancy Act of 1824<sup>48</sup> punishes “Every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms” and “Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence and not giving a good account of himself or herself”.

If we look at the audience which is affected by this kind of laws, it is evident that it is the homeless population. The only purpose of this law is to ban a set of actions which are carried out solely by the homeless. The rationale behind it is what can be called the “broken-windows” theory<sup>49</sup>. This term refers to a theory in criminology which implies that the

---

<sup>45</sup>European Federation of National Organisations working with the Homeless, *Mean streets: A Report on the Criminalisation of Homelessness in Europe*, available at: feantsa.org

<sup>46</sup> *Supra* n. 20, p.14

<sup>47</sup> Government of Ontario, *Safe Streets Act*, 1999, S.O. 1999, c. 8

<sup>48</sup> Parliament of the United Kingdom, *An Act for the punishment of idle and disorderly persons, rogues and vagabonds*, 5 Geo. IV c. 83

<sup>49</sup> Wilson, James Q; Kelling, George L (Mar 1982), "Broken Windows: The police and neighborhood safety", *The Atlantic*, retrieved 2007-09-03

absence of appropriate legal responses to the first signs of unlawfulness in a neighborhood might be interpreted as if the neighborhood tolerates crime. It entails that in order to prevent vandalism, actions should be taken against the smallest example of disorder. In addition, homeless people are seen as potential criminals who should be removed from public spaces to prevent more serious crime in local communities. Measures which are directed at controlling public space are created in order to make homelessness invisible. Often the prohibition of homeless conducts is framed in terms of public order and thus it is taken away from the area of competence of “positive” social policies<sup>50</sup>.

To continue with, quality of life ordinances are those which regulate “low-level non-violent crimes of activities frequently considered nuisances and are mainly intended to regulate uncivil behavior and public disorder in public spaces”.<sup>51</sup> The activities which are listed in this kind of ordinances are characterized by the fact that they would not be criminalized if they occurred on private property or within one’s home. They include restrictions on drinking in public, littering and so on. The problem of this set of ordinances is that they result into indirect discrimination of those who do not have a home. An apparent neutral provision then results in discrimination when enforced.

## Conclusion

This analysis started with providing a new kind of approach to homelessness. What was argued is that it is possible to consider homelessness as a ground of discrimination if seen in an intersectional perspective. The fundamental element of intersectionality is power: it describes the specific and distinctive experience of those who are subjected to historical disadvantage because of society’s reaction to them. The different examples of regulations analyzed proved the fact that the homeless are subjected to systemic discrimination. Homelessness should not be defined only in terms of lack of housing: the stigma of being homeless is what makes their condition unique.

As already stated earlier, Canada can be considered a leading example in the field of intersectionality. Canadian courts have applied the analogous approach in order to expand the number of protected grounds under the Canadian Charter of Rights of Freedoms<sup>52</sup>. Section 15(1) of the Charter states: “Every individual is equal before and under the law and has the

---

<sup>50</sup> Marco Tosi, “Homelessness and the Control of Public Space – Criminalising the Poor?”, *European Observatory on Homelessness* 2007, no.1: 229

<sup>51</sup> *Supra* n. 42, p. 6

<sup>52</sup> *Supra* n. 10

right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” This article has been further interpreted by the Courts in order to extend its application to grounds that are not expressly mentioned, the so-called “analogous grounds” or “insula minorities”. In *Andrews v. Law Society of British Columbia*<sup>53</sup> the Supreme Court of Canada affirmed that whether or not the protection granted by Section 15 could also be of a specific groups is a:

[D]etermination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others<sup>54</sup>.

Since that decision, the Court has stretched the analogous grounds approach to include other grounds such as sexual orientation, marital status and so on. As emphasized at the beginning of this essay, the Court relied on the historical disadvantage suffered by members of this group. The question whether homelessness or social condition should be considered as an analogous ground has not been settled yet by the Canadian Supreme Court.

If we look at sources of international law, articles 2, and 26 of the International Covenant on Civil and Political Rights impose that all persons should enjoy equal protection of the laws regardless of social origin, property or other status.<sup>55</sup> Article 1 of the American Convention on Human Rights bans discrimination on the basis of “social origin ... or any other social condition”<sup>56</sup>.

Introducing homelessness or, more in general, social condition as a prohibited ground of discrimination “provides the potential of better reflecting the realities of discrimination in that it, in many ways, offers a means for recognizing the way social and economic

---

<sup>53</sup> *Andrew v. Law Society of British Columbia*, 8 [1989] 1 S.C.R. 143

<sup>54</sup> *Ibid.* at 152-53

<sup>55</sup> The United Nations General Assembly, 1966, “International Covenant on Civil and Political Rights.”, *Treaty Series* 999 (December): 171

<sup>56</sup> Organization of American States, 1969, “American Convention on Human Rights.” *Treaty Series, No. 36*. San Jose: Organization of American States

disadvantage intersects with other grounds of discrimination<sup>57</sup>. Failing to recognize this kind of intersectional discrimination results in countless individuals falling through the cracks of anti-discrimination law. The discrimination which results from enforcement of quality of life and anti-homeless regulations is an example of this. The approach to discrimination used by courts and legislators should be an inclusive one, rather than the opposite. Social condition can intersect with numerous other relevant characteristics such as race, gender, race or ethnic origin and therefore result in aggravated discrimination. These people might seek and obtain justice on the base of recognized ground, if they are lucky. However, what is even more endangered is the position of those who do not fall into any of these categories and are being discriminated only because of their socio-economic status. They are left without any kind of remedy.

---

<sup>57</sup> Wayne MacKay and Natasha Kim, *Adding Social Condition to the Canadian Human Right Act*, 2009, p. 76 Available at: <http://www.chrc-ccdp.ca/>

## Bibliography

### International sources

Organization of American States. 1969. "American Convention on Human Rights." *Treaty Series* 36

The United Nations General Assembly. 1966. "International Covenant on Civil and Political Rights." *Treaty Series* 999 (December): 171.

The United Nations General Assembly. 1966. "International Covenant on Social and Cultural Rights". *Treaty Series* 993 (December): 3

Council of Europe. 1950. "Convention for the Protection of Human Rights and Fundamental Freedoms." *Council of Europe Treaty Series*: 005.

European Union. 2010. "Charter of Fundamental Rights of the European Union". *Official Journal of the European Union* C83: 53

### National legislation

*Canadian Charter of Rights and Freedoms*. Part I of the Constitution Act. 1982, being Schedule B to the Canada Act 1982 (UK). 1982, c11.

Government of Ontario. *Safe Streets Act*. 1999. S.O. 1999, c. 8

Parliament of the United Kingdom, *An Act for the punishment of idle and disorderly persons, rogues and vagabond*, 5 Geo. IV c. 83

### Cases

Egan v. Canada 1995 2 S.C.R 513. SCC.



Law v. Canada 1999 1 S.C.R. 497. SCC.

Corbière v. Canada 1999 2 S.C.R. 203. SCC

Tanudjaja v Canada (Attorney General), 2013 ONSC 5410

Andrew v. Law Society of British Columbia. 8 [1989] 1 S.C.R. 143

Secondary sources

Adams, Lucy. In the public eye: addressing the negative impact of laws regulating public space on people experiencing homelessness. *The Winston Churchill Memorial Trust of Australia*.

Avvocato di Strada ONLUS, *Una strada diversa. Homelessness e persone LGBT*, 2014.

Available at: [www.avvocatodistrada.it](http://www.avvocatodistrada.it)

Aylward, Carol A. Intersectionality: Crossing the Theoretical and Praxis Divide. *Journal of Critical Race Inquiry* 2010: 1

Canadian Observatory on Homelessness. "Canadian Definition of Homelessness". 2012.

Available at: [www.homelesshub.ca/homelessdefinition/](http://www.homelesshub.ca/homelessdefinition/).

Chris Herring and Dilara Yarbrough. *Punishing the Poorest: How the Criminalization of Homelessness Perpetuates Poverty in San Francisco*. 2015. 6. Available at SSRN:

<https://ssrn.com/abstract=2620426>

Crenshaw, Kimberly. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum*: 1989, no. 1: Article 8.

Crenshaw, Kimberly. "Mapping The Margins: Intersectionality, Identity Politics, And Violence Against Women Of Color". *Stanford Law Review* 43, no. 6: 1241.

Eaton, Mary. “Patently Confused: Complex Inequality and Canada v. Mossop”. *Rev. Const. - Stud.* 203 1993-1994: 203- 245

European Federation of National Organisations working with the Homeless. *Mean streets: A Report on the Criminalisation of Homelessness in Europe*. Available at: [www.feantsa.org](http://www.feantsa.org)

Florescu, Caterina. “Disturbi psichiatrici nelle persone senza dimora”. Master diss., Faculty of Medicine - University of Bologna, 2016.

Fredman, Sara. *Intersectional Discrimination In EU Gender Equality And Non-Discrimination Law* (Luxembourg: Publications Office, 2016). 8.

Jackman, Martha. “Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law”. *Review of Constitutional Studies* 1994: II. 1.

Lurie Kaya and Schuster, Breanne. Ed. Sara K. Rankin. *Discrimination At The Margins: The Intersectionality Of Homelessness & Other Marginalized Group*. Homeless Rights Advocacy Project. Seattle University School of Law. 2015.

MacKay, Wayne and Kim, Natasha. *Adding Social Condition to the Canadian Human Right Act*. 2009. Available at: <http://www.chrc-ccdp.ca/>

Melissa Johnstone et al. Discrimination and wellbeing amongst the homeless: the role of multiple group membership. *Front. Psychol.* 2015, 6: 739. Doi: 10.3389/fpsyg.2015.00739

Mental Health Europe. *Access to services by people with severe mental health problems*. 2013.

National Law Center on homelessness & Poverty. *No Safe Place : the Criminalization of Homelessness in U.S. Cities*. 2014. Available at: [homelesshub.ca](http://homelesshub.ca)

Nordfelt, Marie. “A Dynamic Perspective on Homelessness: Homeless Families in Stockholm”. *European Journal of Homelessness* 2012: 6. 1. 105 – 123

Ontario Human Rights Commission. *An Intersectional Approach To Discrimination*. 2002. Available at: <http://www.ohrc.on.ca/en>

Sealy-Harrington J. "Should Homelessness be an Analogous Ground? Clarifying the Multi-Variable Approach to Section 15 of the Charter". The University of Calgary Faculty of Law Blog on Developments in Alberta Law. Accessed December 19, 2013. Available at: <http://ablawg.ca/2013/12/19/should-homelessness-be-an-analogous-ground-clarifying-the-multi-variable-approach-to-section-15-of-the-charter/>

Smith, Ben. "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective", *The Equal Rights Review* 2016: 74.

Sylvestre Maria-Eve and Bellot, Céline. Ed. Martha Jackman and Bruce Porter Challenging Discriminatory and Punitive Responses to Homelessness in Canada. *Advancing Social Rights in Canada*, Irwin Law 2014. Available at SSRN: <https://ssrn.com/abstract=2484975>

Tarunabh, Khaitan. *A Theory Of Discrimination Law* (Oxford: Oxford University Press, 2015).

Tosi, Marco. "Homelessness and the Control of Public Space – Criminalising the Poor?". *European Observatory on Homelessness* 2007. No.1: 225 – 235

Zerger et al. Differential experiences of discrimination among ethnoracially diverse persons experiencing mental illness and homelessness. *BMC Psychiatry* 2014. 14:353