



INSTITUTE FOR INTERNATIONAL LAW & HUMAN RIGHTS

*ACCESS TO HOUSING FOR VULNERABLE
POPULATIONS IN IRAQ*

JULY 2009

**Prepared by the Institute for International Law & Human Rights
With The Assistance Of Georgetown University Law School**

ACCESS TO HOUSING FOR VULNERABLE POPULATIONS IN IRAQ

What type of right should the right to housing be?

- Human right to adequate housing

What is “adequate housing?”

- Security of Tenure
- Availability of Services, Materials, Facilities, and Infrastructure
- Affordability
- Habitability
- Accessibility
- Location
- Cultural Adequacy

Where is the right to adequate housing found in international law?

- Universal Declaration of Human Rights
- International Covenant on Economic, Social, and Cultural Rights
- Convention on the Elimination of all Forms of Discrimination Against Women
- Convention on the Rights of the Child
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Convention on Civil and Political Rights
- International Convention on the Status of Refugees
- International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- International Convention on the Rights of All Migrant Workers and Their Families

Why should Iraq guarantee a right to housing for members of its vulnerable populations?

- Enshrined the right to housing in its constitution
- A party to the Universal Declaration of Human Rights
- Has ratified the Universal Declaration of Human Rights
- Has ratified the Convention on the Elimination of all Forms of Discrimination Against Women
- Has ratified the Convention on the Rights of the Child

What measures should Iraq take in creating a right to adequate housing and making sure that such a right is realized by members of its vulnerable populations?

- Create a national legal framework providing for the right to adequate housing
- Allow for the adjudication of housing rights
- Implement positive action or discrimination policies

ACCESS TO HOUSING FOR VULNERABLE POPULATIONS IN IRAQ

Executive Summary

Iraq has an obligation to ensure that members of its vulnerable populations have access to adequate housing. Iraq is a party to several international agreements, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights, and the country established a right to appropriate housing in its constitution. Article 30 of the Iraqi Constitution stipulates that “[t]he State shall guarantee to the individual and the family – especially children and women – social and health security, the basic requirements for living a free and decent life, and shall secure for them suitable income and appropriate housing.”

In order to make sure that this housing right is implemented for the country’s vulnerable populations, Iraq should consider taking several measures, including to create a national legal framework, establish a system that allows for the adjudication of economic, social and cultural rights, specifically the right to adequate housing, and to implement special policies for these vulnerable populations. In establishing such a system, Iraq will find many relevant examples and precedents including those from Central and South Asia, the European community, Latin America, and South Africa.

With respect to creating a national legal framework, Iraq is on the right track and has already taken the first step by recognizing the right to adequate housing in its constitution. However, the country could further elaborate on this right by creating specific housing benefits for members of the vulnerable populations in the country. As the country enacts its housing-related legislation, Iraq will need to consider how to define the housing right, and how the country seeks to provide assistance to those that are considered vulnerable. Assistance may include providing rental subsidies or establishing government offices in different regions of Iraq responsible for providing assistance to these individuals.

In establishing a system that allows for the adjudication of economic, social and cultural rights, specifically the right to adequate housing, Iraq may want to consider studying policies, systems or laws implemented in other countries, particularly the South African one, which has been praised for the way it adjudicates such rights.

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ACCESS TO HOUSING FOR VULNERABLE POPULATIONS IN IRAQ

Statement of Purpose

This paper focuses on presenting options how Iraq can provide access to housing for its vulnerable populations by comparing best state practices. Specifically we are examining: the way in which other countries have sought to create housing rights in their constitutions and statutes; the manner in which these countries have allowed for the justifiability of economic, social and cultural rights, in particular, adequate housing; and various positive discrimination or affirmative action policies used to provide adequate housing.

Introduction

The “civilian population in Iraq . . . faces one of the most complex and violent situations in the world.”¹ Approximately 8 million Iraqi civilians are in urgent need of humanitarian assistance. One of the primary humanitarian concerns for those living in Iraq, specifically the vulnerable populations, is access to housing. According to the United States Congress, vulnerable populations in Iraq include “internally displaced persons (IDPs), Iraqis from ethnically mixed families, women at risk, unaccompanied children and adolescents, the elderly, Iraqis with serious medical needs, survivors of violence or torture, Iraqis who are members of religious or other minority groups, including Chaldo-Assyrian Christians, Sabian Mandaens, Yazidis, Jews and Baha’is, and any other group determined to be vulnerable by the Secretary of State in consultation with the UNHCR.”²

Iraq as member of United Nations accepted the Universal Declaration of Human Rights and signed (February 18, 1969) and ratified (June 25, 1971) the International Covenant on Economic, Social and Cultural Rights; and ratified it on. Furthermore, Iraq underlines in its Constitution the respect for international standards on Human rights outlining the right to appropriate housing for its citizens. Therefore, Iraq assumed constitutional and legal responsibility to fulfill its obligations to provide adequate housing to those residing in the country.

This paper calls for a human-rights based approach to the access to housing problem in Iraq. Part I provides reasons for why a human-rights based approach to the access to

¹United Nations and Partners, *Strategic Framework for Humanitarian Action in Iraq*, Apr. 2007, NGO COORDINATION COMMITTEE IN IRAQ, http://www.ncciraq.org/IMG/pdf_Strategic_Framework_for_Humanitarian_Action_in_Iraq.pdf.

²Iraqi Refugee and Internally Displaced Persons Humanitarian Assistance, Resettlement, and Security Act of 2009, H.R. 578, 111th Congress (as introduced in House, Jan. 15 2009), *available at* <http://www.opencongress.org/bill/111-h578/text>. There are many definitions of vulnerable populations; for instance, Save the Children UK defines vulnerable populations to include children, the internally displaced, widows, the elderly and the poor. *The Humanitarian Implications of Military Action Against Iraq*, Sept. 4, 2002, SAVE THE CHILDREN UK, <http://www.globalpolicy.org/security/issues/iraq/attack/2002/0904save.htm> (last visited Mar. 26, 2009). However, for the purposes of this essay, the definition provided in the H.R. 578 will be used.

housing problem is the most appropriate one, and defines “adequate housing.” Part II provides an overview of where the right to adequate housing is guaranteed in international human rights law. In Part III, the analyses provides case studies of various countries that have guaranteed the right to adequate housing. Part III examines (1) the constitutional and statutory provisions of several countries; (2) the adjudication of economic, social and cultural rights in other countries; and (3) the positive action and discrimination policies implemented in the respective countries and regions. Finally, Part IV provides suggestions on how Iraq can: create a legal framework providing the right to adequate housing for its vulnerable populations; establish a system that allows for the adjudication of housing rights; and implement positive action or discrimination polices to help its vulnerable populations.

I. The Human Right to Adequate Housing

This section highlights reasons for adopting a human rights-based approach to providing access to adequate housing and defines what constitutes “adequate housing.”

A. The Human Rights-Based Approach to Adequate Housing

A human rights based approach to development is creating a framework for the process of development based on international human rights standards. A rights-based approach “integrates the norms, standards, and principles of the international human rights system into the plans, policies and processes of development.” These norms and standards are contained in international treaties and declarations, and include “the principles of equality and equity, accountability, empowerment and participation”³.

“Housing rights are rooted in the concept of human dignity,”⁴ and human dignity requires that each individual has a decent standard of living. “[E]ssential to the achievement of this standard and therefore to the fulfillment of human life beyond simple survival is access to adequate housing.”⁵ Adequate housing “fulfills physical needs by providing security and shelter from weather and climate. It fulfills psychological needs by providing a sense of personal space and privacy. It fulfills social needs by providing a gathering area and communal space for the human family, the basic unit of society. [And] in many societies, it also fulfills economic needs by functioning as a center for commercial production.”⁶

³ *Definition of a Rights Based Approach*, <http://www.unhchr.ch/development /approaches-04.html>

⁴Padraic Kenna, *Globalization and Housing Rights*, 15 IND. J. GLOBAL LEGAL STUD. 397, 436 (2008).

⁵*The Right to Housing*, HUMAN RIGHTS EDUCATION ASSOCIATION, http://www.hrea.org/index.php? base_id=149 (last visited Mar. 28, 2009).

⁶*Id.*

Therefore, the human-rights based approach to adequate housing may be one of the most effective means of achieving housing rights for all.⁷

There are also policy reasons for adopting a human rights-based approach. First, a human rights-based approach creates legally binding obligations and duties upon the state and creates legally enforceable entitlements and rights on behalf of the people.⁸ In addition, by focusing on the human right to adequate housing, one creates a common, clear conceptual framework for addressing the issue and forces governments that take such rights seriously to do what they can to ensure that people enjoy the right in practice.⁹ Human rights based approaches hold governments accountable under law, as not providing access to housing tells the world that '[t]he government has consciously... not done certain things and as a result of that it has violated the rights of its citizens.'¹⁰ Moreover, a human-rights based approach does not depend on who is in power as the government is forced to apply the same principals no matter the political affiliation.¹¹ And finally, this approach provides individuals with remedies that one would normally not have; in short, a human-rights based approach allows an individual to turn to official institutions and to demand that his or her right be protected.¹²

B. What is the Right to Adequate Housing?

The right to adequate housing includes more than the right to shelter. According to General Comment No. 4 adopted by the United Nations Committee on Economic, Social and Cultural Rights, the single most authoritative interpretation of the right to adequate housing under international human rights law, adequate housing includes (1) the security of tenure; (2) the availability of services, materials, facilities, and infrastructure; (3) affordability; (4) habitability; (5) accessibility; (6) location; and (7) cultural adequacy.¹³

1. Security of Tenure

⁷Scott Leckie, *Framing the Discussion About Housing Rights*, CENTRE ON HOUSING RIGHTS AND EVICTIONS (COHRE), available at <http://www.cohre.org/store/attachments/COHRE%20Training%20FRAMING%20THE%20DISCUSSION%20ABOUT%20HOUSING%20RIGHTS.doc>.

⁸*Id.* at 1.

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* at 2.

¹²*Id.*

¹³Office of the U.N. High Comm'r for Human Rights, Comm. on Econ., Social, & Cultural Rights, The Right to Adequate Housing, General Comment No. 4, available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument) (last visited Apr. 24, 2009).

Security of tenure includes the guaranteed legal protection against forced eviction, harassment, and other threats.¹⁴ Some claim that security of tenure is the cornerstone of the right to adequate housing as without it, people lack control over their housing¹⁵ meaning lack the incentive to maintain or improve their homes for fear that their property will be taken away or destroyed.¹⁶ Moreover, lack of tenure reinforces social exclusion and poverty as often these individuals are discriminated against due to their inability to afford housing with secure tenure,¹⁷ or belong to groups for whom secure tenure is not legally available. In particular, the issue is significant for women, who may be forced to flee their homes to escape abuse (domestic violence) or may lack title to their homes and can easily be evicted or removed.¹⁸

¹⁴*Id.*

¹⁵Leckie, *supra* note 6, at 6.

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* at 5.

2. Availability of Services, Materials, Facilities, and Infrastructure

An adequate house must also contain certain facilities essential for health, security, comfort and nutrition.¹⁹ All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.²⁰ Without these basic necessities, the right to adequate housing is not completely realized.

3. Affordability

Affordability is also an element of adequate housing. The cost of housing should be at a level that allows for the attainment and satisfaction of other basic needs.²¹ General Comment No. 4 declares that States that are a party to the International Covenant on Economic, Social and Cultural Rights should take steps to make sure that the percentage of housing-related costs is, in general, commensurate with income levels.²² Moreover, it requires States to establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs.²³

4. Habitability

Adequate housing must be habitable and should provide individuals “with adequate space and protect them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well.”²⁴ Habitability is included as an essential element of adequate housing as lacking of these items is “frequently associated with diseases and higher mortality rates.”²⁵

¹⁹Office of the U.N. High Comm'r for Human Rights, General Comment No. 4, The Right to Adequate Housing, § 8(b).

²⁰*Id.*

²¹*Id.*

²²Office of the U.N. High Comm'r for Human Rights, General Comment No. 4, The Right to Adequate Housing, § 8(c).

²³*Id.*

²⁴*Id.* § 8(d).

²⁵Leckie, *supra* note 6, at 7.

5. Accessibility

Adequate housing requires that the housing provided be accessible by those who need it. When providing housing, the state must consider and take into account the needs of those the housing is meant to benefit. For instance, “disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere.”²⁶ “Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.”²⁷

6. Location

In order to be considered adequate, the location of housing must allow for access to employment options, health-care services, schools, child-care centers and other social facilities.²⁸ Moreover, housing must not be located near dumps or other sources of pollution as locating housing in these areas would threaten the health of those living there.²⁹

7. Cultural Adequacy

Cultural adequacy requires that the way the housing is constructed, the building materials used, and the policies with respect to housing should allow “for the expression of cultural identity and diversity of housing.”³⁰ This element requires that cultural expression and diversity not be sacrificed for the sake of development or modernization.³¹

²⁶Office of the U.N. High Comm'r for Human Rights, General Comment No. 4, The Right to Adequate Housing, § 8(e).

²⁷*Right to Housing Overview: The Human Right to Housing* (last updated on Mar. 17, 2009), NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY: STREET LAWYER: LEGAL TOOLS FOR ECONOMIC JUSTICE, <http://wiki.nlchp.org/display/Manual/Right+to+Housing+Overview> (last visited Apr. 23, 2009).

²⁸Office of the U.N. High Comm'r for Human Rights, General Comment No. 4, The Right to Adequate Housing, § 8(f).

²⁹*Id.*

³⁰Office of the U.N. High Comm'r for Human Rights, General Comment No. 4, The Right to Adequate Housing, § 8(g).

³¹*Id.*

II. The International Legal Framework

The right to housing has been established as a basic human right in international human rights instruments and agreements for more than fifty years.³² Of these agreements, the Universal Declaration of Human Rights³³ and the International Covenant on Economic, Social and Cultural Rights³⁴ are the two primary instruments that protect housing rights. Other conventions specifically recognize the right to housing for particular groups.

A. Universal Declaration of Human Rights

As the first major international instrument on human rights, The Universal Declaration (adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948) stipulates under Article 25(1) that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.”³⁵

B. International Covenant on Economic, Social and Cultural Rights

Under the International Covenant on Economic, Social and Cultural Rights (the “Covenant”) ratified by Iraq in 1971 contracting states are required to take steps towards the full implementation of the economic, social and cultural rights, one of which was recognized as the right to adequate housing. Article 11(1) of the Covenant requires that contracting states “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”³⁶ and is considered to be the most significant articulation of the international right to adequate housing.³⁷ The implementation of Covenant is monitored by

³²Padraic Kenna, *Housing Rights – A Fresh Approach*, Autumn 2003, Homeless in Europe: The Right to Housing, Homeless in Europe, FEANTSA, http://www.feantsa.org/files/Month%20Publications/EN/right_to_housing_2003_english.pdf.

³³Universal Declaration of Human Rights (hereinafter “Universal Declaration”), Dec. 10, 1948, UN General Assembly Resolution 217A(III), U.N. Doc. A/810, *available at* <http://www.un.org/Overview/rights.html>.

³⁴International Covenant on Economic, Social and Cultural Rights (hereinafter “International Covenant”), Dec. 16, 1966, 993 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

³⁵Universal Declaration, Art. 25(1).

³⁶International Covenant, Art. 11(1).

³⁷Urban Sector Network, *Expanding Socio-Economic Rights and Access to Housing* 11 (Oct. 29, 2003), *available at* <http://www.dag.org.za/docs/research/18.pdf>.

the Committee on Economic, Social and Cultural Rights (CESCR)³⁸, and further elaborated the provisions in General Comment 4 (1991) specifically defining rights, describing state obligations and more.

C. International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination contains two articles that pertain to housing. Article 3 states that state parties “condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction”.

Article 5 states that State Parties “undertake to prohibit and eliminate racial discrimination in all its forms and ... guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin to equality before the law, notably in the enjoyment of ...the right to housing.”

D. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights sets out a variety of rights that ensure individuals are treated equally. Article 2 outlines the commitment that State Parties make to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 12 specifically relates to housing, as it outlines the right not only to enter one’s own country, but also the right to choose freely one’s own place of residence.

E. International Convention on the Status of Refugees

The International Convention on the Status of Refugees specifically mentions housing in Article 21, which provides that “as regards housing, the Contracting States ... shall accord refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances.”

F. International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment upholds housing rights through Article 16, which states that “each State Party shall undertake to prevent...acts of cruel, inhuman or degrading

³⁸*Id.*

treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

UN Human Rights Commission affirmed in 1993 that forced evictions violate a range of human rights, including the right to adequate housing, the right to be free from arbitrary or unlawful interference with the home, the right to life, the right to security of the person, the right to humane treatment, and the right to the highest attainable standard of health. Forced evictions can constitute cruel or inhuman treatment, and under certain circumstances may amount to torture itself under international human rights law. In 2002, the forced eviction of a Roma settlement was determined to be a violation of Article 16 of the Convention. (*Hijrizi v. Yugoslavia*)³⁹

³⁹ *International Jurisprudence*, www.cohre.org/view_page.php?page_id=211.

G. International Convention on the Rights of All Migrant Workers and Their Families

Part III, Article 15 of the International Convention on the Rights of All Migrant Workers and Their Families, provides that “no migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation”.

Part IV, Article 43 outlines the right of migrant workers to enjoy equality of treatment with State Party Nationals with regard to “...(d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents.”

H. The Convention on the Elimination of all Forms of Discrimination against Women

The Convention on the Elimination of all Forms of Discrimination against Women is one of the most important one addressing obligation of signing states “to eliminate discrimination against women in rural areas in order to ensure on a basis of equality of men and women . . . adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”⁴⁰ The convention also requires states to “ensure equality in relation to the right to bank loans, mortgages, and other forms of financial credit.”⁴¹

I. The Convention on the Rights of the Child

A child’s right to adequate housing is protected under the Convention on the Rights of the Child, which requires party states to “take appropriate measures to assist parents and others responsible for the child to implement this right and shall, in case of need, provide material assistance and support programs, particularly with regard to nutrition, clothing, and housing.”⁴²

J. The Guiding Principles on Internal Displacement

⁴⁰Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 513, available at <http://www.un.org/womenwatch/daw/cedaw/>.

⁴¹*Id.*

⁴²Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

The Guiding Principles on Internal Displacement offer further guidelines to examine. Principle 18 provides that “all internally displaced persons have the right to an adequate standard of living”. Principle 18 specifies that this “adequate standard” includes “basic shelter and housing”.

Principle 21 states that “no one shall be arbitrarily deprived of property and possessions”, and goes further to state that the “property and possessions of internally displaced persons shall in all circumstances be protected.”

III. Comparative Studies

As Iraq seeks to provide adequate housing for members of its vulnerable populations, we will try presenting appropriate case studies on how other countries have provided the right to adequate housing. We examined options assumed by countries in Central and South Asia, Europe, particularly Scotland and Spain, Latin America, specifically Venezuela, and finally, South Africa.

These case studies are highlighting the constitutional and legal provisions that provide the right to adequate housing; examines the manner in which these countries have implemented basic economic, social and cultural rights, in particular the right to adequate housing; and⁴³ how these countries have used positive action or positive discrimination as a

⁴³The justiciability of social, economic, and cultural rights is a highly debated issue because it has traditionally been accepted that these rights are non-justiciable. However, today, there are many convincing arguments that these rights are justiciable. The traditional arguments against the justiciability of such rights fall into two categories: (1) those that focus on democratic legitimacy issues and (2) those that challenge the ability of the courts to address and resolve social, economic, and cultural rights issues. Eric C. Christiansen, *Exporting South Africa's Social Rights Jurisprudence*, 5 LOY. U. CHI. INT'L L. REV. 29, 34 (2007). The arguments focusing on democratic legitimacy issues “are mostly focused on the anti-democratic nature of judicial decision-making.” Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 322 (2007). They argue that “while rights to housing, health care, education, and other forms of social welfare may have value as moral statements of a nation's ideals, they should not be viewed as a legal declaration of enforceable rights. Adjudication of such rights requires an assessment of fundamental social values that can only be carried out legitimately by the political branches of government, and the proper enforcement of socio-economic rights requires significant government resources that can only be adequately assessed and balanced by the legislature. Judges and courts . . . lack the political legitimacy and institutional competence to decide such matters.” Christiansen, *Exporting South Africa's Social Rights Jurisprudence*, 5 LOY. U. CHI. INT'L L. REV. 35. Those that challenge the ability of judges and the courts to address and resolve these rights argue that there are “[1] procedural limitations, especially concerns about the general suitability of any particular plaintiff; [(2)] informational problems, including the absence of specialized, unbiased fact-finding; [(3)] remedy-related difficulties, particularly where judicial remedies would be inadequate or politically inappropriate.” *Id.* at 34.

While opponents to the adjudication of social, economic, and cultural rights have legitimate concerns, the South African experience indicates that within certain parameters, there is a possible means to adjudicate such rights. First, with respect to the first traditional category of arguments, the separation of powers concern can be alleviated because under a system in which social and economic rights would be enforced by the courts,

(continued)

tool in providing adequate housing to the vulnerable populations.⁴⁴ By positive action is meant the process of creating special measures to provide access to housing for certain segments of society, in particular those who belong to vulnerable groups or with special needs.

A. Central and South Asia

Several countries in Central and South Asia that have stipulated the right to adequate housing in their constitutions.. Article 3 of the Iranian Constitution states the government's duty to direct all its recourses to abolishing all forms of deprivation with respect to food, housing, work, health care, and the provision of social insurance for all.⁴⁵ Furthermore, Article 31 stipulates that every Iranian person and family has the right to a suitable dwelling and that the government is responsible for laying the groundwork to accomplish it. Pakistan enshrines the right to housing in its constitution as well: "The State shall provide basic necessities of life such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment."⁴⁶

B. The European Union

The European Union has accepted and further developed the right to adequate housing for its citizens. Provisions of the European Social Charter of 1996 are mandatory to

these rights would be enforced in the same way as civil and political rights, in which legislation concerning social and economic rights would be enacted by the legislature and not the judiciary, and the responsibility of the judiciary would be to review the state's action. Randal S. Jeffrey, *Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations*, 27 COLUM. J.L. & SOC. PROBS. 1, 15 (1993). In addition, the second concern can also be alleviated with the development of case law and precedent. Jeffrey argues that the "lack of standards for judging social and economic rights is not due to institutional constraints, but instead to a lack of judicial experience in considering and adjudicating these rights. While the standards might be vague now, they would develop concreteness as the judiciary and commentators confront these rights." *Id.* at 17.

⁴⁴Positive discrimination or positive action is also a hotly debated issue. There are many definitions of positive action or discrimination. For instance, some have defined positive action or discrimination as "the process of discriminating by laws and policies in a society's distribution of benefits, advantages, and opportunities, not by reference to individual needs, or a person's entitlement, or his deserts or merit but by reference to 'irrelevant criteria', e.g. race or sex . . ." Lord Scarman, *Foreword to JOHN EDWARDS, POSITIVE DISCRIMINATION, SOCIAL JUSTICE, AND SOCIAL POLICY*, at iv (1987). Others have provided a broader definition: "any measure that contributes to the elimination of inequalities in practice[.]" including actions such as accommodations for people with disabilities. European Network Against Racism, *Understanding Positive Action: From Theory to Practice* 10 (Nov. 2007), available at http://cms.horus.be/files/99935/MediaArchive/pdf/Seminar%20Report_EN_final.pdf.

⁴⁵*Isla'ha't Va Taqyyra'ti Va Tatmimah Qanuni Assasi [Amendment to the Constitution]* 1368, art. 3 [1989].

⁴⁶*Isla'ha't Va Taqyyra'ti Va Tatmimah Qanuni Assasi [Amendment to the Constitution]* 1368, art. 31 [1989].

implement by every member state and provides individuals with the right to adequate housing in Part I, Article 31 stating, “[with a view to ensuring the effective exercise of the right to housing, the Parties undertake” (1) to promote access to housing of an adequate standard; (2) to prevent and reduce homelessness with a view to its gradual elimination; and (3) to make the price of housing accessible to those without adequate resources.⁴⁷ In addition, all European states have adopted the United Nations Habitat Agenda,⁴⁸ which states that “[within the overall context of an enabling approach, Governments should take appropriate action in order to promote, protect and ensure the full and progressive realization of the right to adequate housing.”⁴⁹

Several countries in Europe have included the right to adequate housing into their constitutions.. For instance, Article 19 of Finland’s Constitution, states, “[t]he public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing.”⁵⁰ Belgium has also provided its citizens with the right to adequate housing as the Belgium Constitution reads, “everyone has the right to enjoy a life in conformity with human dignity. Towards this end, the law, the decree or rules established under article 134 guarantees, taking into account the corresponding obligations, economic, social, and cultural rights of which they determine the conditions for their implementation.”⁵¹ These rights include, in particular, the right to decent accommodation.⁵² Furthermore we will examine two European country that have established good models of implementing the right to adequate housing and have sought to guarantee those rights include Scotland and Spain.

1. Scotland

Scotland faces acute crises of homelessness as “In 2007-08, 56,609 households made homeless applications to their local council in Scotland”⁵³ and “40,299 of [the] households

⁴⁷European Social Charter (Revised), E.T.S. 163, art. 31, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

⁴⁸The Habitat Agenda is the key political document resulting from the Habitat II conference in Istanbul, Turkey in June 1996. UN Habitat: For a Better Urban Future, *Habitat Agenda*, available at <http://www.unhabitat.org/content.asp?ID=1176&catid=10&typeid=24&subMenuId=0>.

⁴⁹Habitat II, Istanbul, Turkey, Jun. 3-14, 1996, *Habitat Agenda*, available at http://www.unhabitat.org/downloads/docs/1176_6455_The_Habitat_Agenda.pdf; see also Kenna, *supra* note 31 (discussing the basic human right to housing and explaining that all the European states have adopted the Habitat Agenda).

⁵⁰Constitution of Finland, Art. 19.

⁵¹Constitution of Belgium, Art. 23.

⁵²Constitution of Belgium, Art. 23 (3).

⁵³Homelessness Statistics, Shelter: The Housing and Homelessness Charity, http://scotland.shelter.org.uk/housing_issues/research_and_statistics/key_statistics/homelessness_facts_and_research (last visited Apr. 24, 2009).

were accepted by their local authority as homeless or potentially homeless, and 32,111 of those households, were assessed as in priority need.”⁵⁴

Therefore Scotland has sought to provide its residents with adequate housing with enforcing the Housing Act adopted in 1977 by the Government of United Kingdom. The law requires municipal authorities to assist the homeless who have a connection with the municipality (or the community).⁵⁵ Scotland adopted its own housing law in 1987 and a law on homelessness in 2001, further expanding it. The Scottish law abolished the “connection with the municipality” which was considered a limitation of the Housing Act for people in need.⁵⁶

In 2003, Scotland improved its housing law by adopting The Homeless Act of 2003 (the “Act”), which “brought Scotland into the forefront of countries recognizing a right to housing and taking affirmative measures to prevent and address homelessness.”⁵⁷ The Act set up a number of rights for the homeless: “a right to temporary accommodation for homeless people, which for most individuals will transition into a permanent housing solution”⁵⁸ ; local authority’s responsibility to accommodate “priority” groups housing, including domestic violence survivors, disabled people, released prisoners, and children with permanent accommodation.⁵⁹ Moreover, the act combines the right to housing with the right to “supportive services necessary to allow an individual to maintain housing.”⁶⁰ The housing provided according to this law may be public housing, or through a Registered Social Landlord (RSL), a non-profit corporation that provides housing.⁶¹ The Act ensures that RSLs accept and place homeless individuals referred by the state into housing, taking into consideration factors such as family accommodations and disabilities.⁶² The Act

⁵⁴*Id.*

⁵⁵Christophe Golay & Melik Özden, *The Right to Housing: A Fundamental Human Right Affirmed by the United Nations and Recognized in Regional Treaties and Numerous National Constitutions* 22, available at <http://www.cetim.ch/en/documents/bro7-log-A4-an.pdf>.

⁵⁶*Id.*

⁵⁷*The Scotland Homeless Act: A Model for All* (last updated Jul. 7, 2009), NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY: STREET LAWYER: LEGAL TOOLS FOR ECONOMIC JUSTICE, <http://wiki.nlchp.org/display/Manual/B.+Scotland> (last visited Apr. 23, 2009).

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

involves both only local authorities - in creating local action plans, and national government to assist in the implementation of the plans.⁶³

Under the Act landlords are restricted from evicting tenants when rent is unpaid due to a delay in the payment of public housing benefits.⁶⁴ In addition, landlords must notify local housing authorities when they are evicting tenants, so that the authorities can direct resources to those particular tenants and allow for care of those the evicted ones. The Act is combined with several other policy initiatives, including the 2001 Mortgage Rights law which gives individuals in danger of foreclosure the right to sell their house to a RSL, which in turn will rent the property back to the owners, preventing homelessness of the former owners.⁶⁵

2. Spain

In 2001 approximately “112,824 people lived in housing with no running water, 13,002 persons lived in buildings in a dilapidated (*ruinoso*) state, 13,660 persons lived in poor (*deficiente*) conditions, and 25,839 in substandard (*malo*) conditions” in Spain.⁶⁶ Certain parts of the population including the elderly were affected more than others: “more than 40,000 elderly people were living in very poor conditions; 110,000 in poor conditions, and more than 500,000 in defective buildings.”⁶⁷

Spain has taken many measures to tackle the access to housing problem, Article 47 of Spain’s Constitution, provides that “[a]ll Spaniards have the right to enjoy decent and adequate housing. The authorities shall promote the conditions necessary and establish pertinent norms to make this right effective, regulating the use of land in accordance with the general interest to prevent speculation. The Community shall share in the increased values generated by urban activities of public bodies.”⁶⁸

Spain also enacted the New Land Law (*Ley del Suelo*) in 2007 creating a minimum land reserve for subsidized housing. Moreover, the law (1) establishes basic rights of citizens with respect to housing, specifically, “the right to enjoy decent and adequate housing in an

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶UN Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari : Addendum : Mission to Spain*, Feb. 7 2008. A/HRC/7/16/Add.2. Online. UNHCR Refworld, available at <http://www.unhcr.org/refworld/docid/47c7d4822.html> (accessed Apr. 24 2009).

⁶⁷*Id.*

⁶⁸Constitución (Constitution of Spain), Art. 47.

adequate environment[;]” (2) proposes measures to create “transparency and participation of citizens in the process of land development[;]” (3) establishes “a compulsory land reserve (a minimum of 30 per cent of the residential building capacity) for new housing under some kind of public protection plan[;]” (4) establishes “instruments to enable value capture from urban development (up to 20 per cent of the capital gains)[;]” and establishes the “use of land for public housing as one of the priorities[.]”⁶⁹

Moreover, the Spanish government has implemented measures to ensure that vulnerable populations in Spain are able to enjoy their right to adequate housing. Public housing assistance (“*vivienda de protección oficial* (VPO)”) in Spain includes financial and non-financial assistance to rent, purchase and rehabilitate VPO units and establishes maximum rental and sale prices.⁷⁰ In 2008, VPO housing prices were up to fifty per cent lower than the free-market value, and it is estimated that twenty five per cent of the total housing stock has received some kind of VPO housing subsidy.⁷¹ Spain has also implemented laws assisting specific members of the population; the Law of Comprehensive Measures against Violence against Women, in force since 2004, offers priority access to public housing and referrals to specialized shelters for victims.⁷²

The state, through its local authorities has also used positive discrimination as a tool to help certain members of vulnerable populations. “[T]he town council of Lleida (Catalonia) opened an Office for Housing information and Counseling for the sole use of foreign individuals . . . in need of special support as far as housing is concerned.”⁷³ The town council of Zaragoza provided assistance to certain disadvantaged populations by granting subsidies to pay up to 50% of the rent for housing already inhabited by foreign migrants as long as the housing met certain quality conditions and there was no overcrowding.⁷⁴

⁶⁹UN Human Rights Council, *supra* note 64.

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.*

⁷³*National Analytical Study on Housing: RAXEN Focal Point for Spain* 40, Oct. 2003, available at http://buildinginclusion.oberaxe.es/repository/library/ES_Housing.pdf.

⁷⁴*Id.*

C. Latin America

Several Latin American countries have included the right to adequate housing in their constitutions. Ecuador, in its new constitution, ensured that its national law was in line with its international human rights obligations by providing for the right to housing, water and sanitation.⁷⁵ In addition, Article 100 of Paraguay's constitution declares, "[e]very inhabitant of the Republic has the right to decent housing facilities. The State will establish conditions conducive to the implementation of this right and will promote housing projects of social interest specially designed for low-income families through adequate methods of financing."⁷⁶

1. Venezuela

Venezuela has had and continues to have housing problems due to a total deficit of between 560,000 and 1.6 million new housing units.⁷⁷ In addition, as of 2004, 942,000 households, which accounts for approximately 15.7 percent of the total households in the country, suffered from severe overcrowding. And while has not completely resolved the access to housing problem, it continue to pursue ways to solve the problem.

Venezuela has recognized the right to adequate housing in the Venezuelan Constitution; Article 82 provides that "[e]very person has the right to adequate, safe and comfortable, hygienic housing, with appropriate essential basic services, including a habitat such as to humanize family, neighborhood and community relations. The progressive meeting of this requirement is the shared responsibility of citizens and the State in all areas. The State shall give priority to families, and shall guarantee them, especially those with meager resources, the possibility of access to social policies and credit for the construction, purchase or enlargement of dwellings."⁷⁸

In addition, the Venezuelan Parliament passed several laws relating to the right to housing. In 2001 was enacted the Lands and Agrarian Development Law which requires both an equitable redistribution of land and wealth and a strategic and progressive planning for the benefit of future generations.⁷⁹ And on July 31, 2008, President Chávez issued the Law of Restructuring of the National Institute of Housing, which "created a new system that reinforces housing as a part of social security and guarantees citizens access to dignified

⁷⁵*Ecuador's New Constitution Includes Several Housing-Related Rights*, Oct. 6 2008, COHRE <http://www.hic-net.org/news.asp?PID=783> (last visited Mar. 28, 2008).

⁷⁶Constitution of Paraguay, Art. 100.

⁷⁷Humberto Márquez, *Venezuela: Many Housing Plans, but Limited Resources*, Jun. 8, 2006, INTER PRESS SERVICE NEWS AGENCY, <http://www.ipsnews.net/print.asp?idnews=33546> (last visited Apr. 23, 2009).

⁷⁸Constitution of the Bolivarian Republic of Venezuela (1999), Art.

⁷⁹ Golay & Özden, *supra* note 53, at 24.

housing,⁸⁰ and the Law of Housing and Habitat Lending, which changed the existing lending laws to encourage rapid housing growth. Some specific changes included providing support for groups that have been historically discriminated against, including the poor, the elderly, and minorities.⁸¹

In addition to legislation the Venezuelan government has taken other positive steps to increase access to housing. In 2002, a presidential decree created Urban Land Committees (CTU – Comités de Tierras Urbanas), tasked with the responsibility of settling land claims with respect to access to property and land in urban settings, especially claims involving the poorest individuals in very poor neighborhoods. The CTUs are also tasked with encouraging “physical improvements of living conditions in neighborhoods guaranteeing services and infrastructure for health, education, and food.”⁸² In particular, the presidential decree “specified that Venezuelans who live in self-built homes on occupied land . . . [have a right to] appeal to the government for title to the land;” the CTUs were required to process these title claims.⁸³ This was significant as almost 60% of Venezuela’s population lives in such communities or barrios.⁸⁴ As of mid 2005, over 84,000 titles were granted to 126,000 families by the CTUs, benefiting approximately 630,000 inhabitants.⁸⁵ The CTUs also formed sub-committees that would “deal with public utility companies, such as water and electricity supply, sewage and garbage disposal, the organization of cultural events, the management of security concerns, the initiation of neighborhood improvement projects, and other issues.”⁸⁶ Such measures make a significant impact because it provides a sense of ownership for those living in these neighborhoods over their homes and community.

In 2004, the government created the Ministry of Housing and Human Environment with the purpose of coordinating government activities to guarantee suitable housing for all inhabitants.⁸⁷ The Ministry and its housing projects are financed from “*Special Petroleum Fund*,” income, generated from Venezuela’s nationally owned oil industry, PDVSA, the

⁸⁰Venezuela Information Office, *Venezuela’s Latest Legislation: The 26 Laws*, <http://www.rethinkvenezuela.com/downloads/Venezuela's%20Latest%20Legislation.pdf> (last visited Apr. 23, 2009).

⁸¹*Id.*

⁸²Golay & Özden, *supra* note 53, at 25.

⁸³Gregory Wilpert, *Venezuela’s Quiet Housing Revolution: Urban Land Reform*, Sept. 12, 2005, venezuelaanalysis.com, <http://www.venezuelaanalysis.com/analysis/1355> (last visited Apr. 23, 2009).

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶Golay & Özden, *supra* note 53, at 25.

⁸⁷*Id.*

world's 76th largest company, and its network of 14,000 Citgo gas stations in the United States."⁸⁸

D. South Africa

.The overwhelming majority of South Africans are poor,⁸⁹ approximately 48.5 percent of the South African population falls below the poverty line, about 11 percent live on less than a dollar per day and 34 percent live on less than two dollars per day.⁹⁰

The housing problem in South Africa must be examined in light of apartheid regime between 1948 and 1994. During this time period, colored people could only live in impoverished rural areas or townships. The difference in the number of brick houses available to colored and white people in the country during this time highlights the consequence of apartheid: here was only one formal brick house for every 43 Africans while there was one for every 3.5 whites.⁹¹ Between 7.5 and 10 million people lived in informal housing such as shanties,⁹² and even more people were in need of adequate housing. To alleviate the negative legacy left behind by apartheid, South Africa recently took significant steps to provide equal access to adequate housing for all. Between 1994 and 2003, approximately 1,530,602 homes were completed or were under construction and approximately 7-8.5 million people were given shelter.⁹³

1. Constitutional and Legislative Protections

The Constitution of the Republic of South Africa was adopted with the hope of establishing a society based on democratic values, social justice and fundamental rights.⁹⁴ Of the many economic, cultural and social rights contained in the constitution, Section 26 reaffirms the right of access to adequate housing and requires the state to take reasonable

⁸⁸Jason Tockman, *Housing Initiatives Improve Quality Of Life for Ordinary Venezuelans*. Sept. 2, 2004, Voltairenet.org, <http://www.voltairenet.org/article122019.html> (last visited Apr. 23, 2009).

⁸⁹John C. Mubangizi, *Protecting Human Rights Amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing*, 2 AFR. J. LEGAL STUD. 130, 132 (2008).

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.*

⁹³Richard Knight, *A Decade of Democracy: Housing, Services, and Land in South Africa*, Mar. 19, 2004, <http://richardknight.homestead.com/files/sihousing2004.htm> (last visited Apr. 24, 2009).

⁹⁴Lindiwe Mokate, *Monitoring Economic and Social Rights in South Africa: The Role of the SAHRC*, http://www.inwent.org/ef-texte/human_rights/mokate.htm (last visited Apr. 24, 2009).

legislative or other measures to achieve the progressive realization of the housing right.⁹⁵ Not only does the Constitution impose an affirmative responsibility to provide access to such housing, the constitution also provides for negative rights by prohibiting arbitrary evictions.⁹⁶ Section 26 states that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”⁹⁷

In addition to the constitutional provisions, the right to adequate housing is supported by implementing legislation, including the Housing Act, the Extension of Security of Tenure Act, the Rental Housing Act, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

The Housing Act was passed in 1997 with the purpose of establishing a sustainable housing development process. Under the Housing Act, “housing development” is defined as the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, health, educational and social amenities. It ensures that all citizens and permanent residents of the Republic will, on a progressive basis, have access to: (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) portable water, adequate sanitary facilities and domestic energy supply.⁹⁸

2. Adjudication of Economic, Social and Cultural Rights

By including economic, social and cultural rights in its constitution, South Africa has provided its citizens with tools to seek enforcement of these rights in courts. , As one scholar observes, “[o]ne of the most distinctive elements of South Africa’s jurisprudence has been its willingness to adjudicate socio-economic rights.”⁹⁹ South African courts have allowed for the justiciability of economic, social and cultural rights, in cases such as *Soobramoney v Minister of Health, KwaZulu-Natal*,¹⁰⁰ *Government of the Republic of South Africa v Grootboom*¹⁰¹ and *Occupiers of 51 Olivia Road v City of Johannesburg*,¹⁰² described below.

⁹⁵S. AFR. CONST. 1996, Section 26.

⁹⁶S. AFR. CONST. 1996, Section 26 (1).

⁹⁷S. AFR. CONST. 1996, Section 26 (3).

⁹⁸Richard Knight, *Housing in South Africa*, Jul. 2001, <http://richardknight.homestead.com/files/sisahousing.htm> (last visited Apr. 24, 2009).

⁹⁹Eric C. Christiansen, *Exporting South Africa’s Social Rights Jurisprudence*, 5 LOY. U. CHI. INT’L L. REV. 29, 34 (2007).

¹⁰⁰*Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC) (S. Afr.).

¹⁰¹*Gov’t of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

a. *Soobramoney v Minister of Health, KwaZulu-Natal*

Soobramoney v. Minister of Health, KwaZulu-Natal was the first substantive socio-economic rights case decided by South Africa's Constitutional Court. The appellant was a terminally-ill diabetic man in the final stages of chronic renal failure. Due to limited resources, the hospital denied dialysis treatment that could have extended his life. It was state medical policy that such treatment be provided only if the acute renal failure could be cured; since the appellant's kidney failure could not be cured the hospital refused to provide the treatment. The appellant, relied on section 27(3) of the constitution, which provides that no one may be refused emergency medical treatment, and section 11, which guarantees everyone's right to life. In the filed suit and the appellant requested from the court to order the hospital to provide the treatment.¹⁰³ The court found that the dialysis treatment to prolong the appellant's life was not covered by the right to "emergency medical treatment."¹⁰⁴ *Soobramoney* is a significant case because it affirmed "the duty of the state in relation to socio-economic rights,"¹⁰⁵ "identified a standard of qualified deference to the legislature [by] [r]eviewing the state health care policies at issue" and determining that the policies to be conform to legitimate medical opinions.¹⁰⁶

b. *Government of the Republic of South Africa v Grootboom*

In *Government of the Republic of South Africa v Grootboom*, a group of squatters, evicted from an informal settlement in the Western Cape, had put up shelters of plastic and other materials at a sports center. These squatters did not have basic sanitation or electricity and brought a suit under section 26 of the Constitution, which guarantees the right of access to adequate housing and requires action by the government in providing this housing, and under section 28, which provides children with the right to basic shelter. The court found a violation of section 26,¹⁰⁷ and ruled that section 26 requires the state to create and implement a coherent, co-coordinated housing program and that in failing to provide for individuals in most desperate need, the government had failed to take reasonable

¹⁰²*Occupiers of 51 Olivia Road v City of Johannesburg* 2008 ZACC 1 (CC) (S. Afr.).

¹⁰³*Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC) (S. Afr.).

¹⁰⁴*Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC) (S. Afr.).

¹⁰⁵Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 361 (2007).

¹⁰⁶*Id.*

¹⁰⁷*Gov't of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

measures to help these individuals progressively realize the right to housing.¹⁰⁸ This decision laid the foundation for the justiciability of economic, social, and cultural rights, including housing rights. The decision indicates that social rights can be adjudicated without taking away policy decisions and choices from the legislature.¹⁰⁹

In addition to providing for the justiciability of economic, social and cultural rights, the court's ruling also outlined that the particular right in question was an unqualified unconstitutional right and it was therefore inappropriate to even consider whether the state had adequate resources to implement such a right. In short, the state has unlimited obligations to ensure that the individuals have access to adequate housing. Due to the importance of this case, it has "widely [been] regarded as an international test case of the enforceability of socio-economic rights."¹¹⁰

c. *Occupiers of 51 Olivia Road v City of Johannesburg*

In *Occupiers of 51 Olivia Road v City of Johannesburg*, the city government, relying on a provision in the National Building Regulations and Building Standards Act (NBRA), tried to evict more than 300 residents, living in poverty, from six unsafe buildings in the inner city of Johannesburg and contended that these actions were aiming for the involved individuals' and of others safety although no alternative accommodation was provided.¹¹¹ The occupiers of these buildings contested the eviction. Of the several claims, the occupiers argued that the city's housing program did not comply with its constitutional and legal obligations to provide adequate housing to those in need. The High Court found that the city failed to fulfill its obligations to establish and implement a plan, and stopped the city from evicting the residents, until they did so.¹¹² The city appealed. The Supreme Court of Appeal of South Africa found that the city government could require the residents to vacate the unsafe buildings; however, the court ordered the city to offer and provide relocation to a temporary settlement for evicted residents in need of housing.¹¹³ The residents appealed.

¹⁰⁸*Gov't of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

¹⁰⁹Jeanne M. Woods, *Emerging Paradigms of Protection for "Second-Generation" Human Rights*, 6 LOY. J. PUB. INT. L. 103, 114 (2005).

¹¹⁰John C. Mubangizi, *Protecting Human Rights Amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing*, 2 AFR. J. LEGAL STUD. 130, 143 (2008).

¹¹¹*Occupiers of 51 Olivia Road v City of Johannesburg* 2008 ZACC 1 (CC) (S. Afr.).

¹¹²Brian Ray, *Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through 'Engagement'*, Oct. 13, 2008, HUMAN RIGHTS LAW REVIEW, available at <http://hrhr.oxfordjournals.org/cgi/content/full/ngno25?ijkey=WhAqNJYpLZZAp&keytype=ref#FN10>.

¹¹³*Occupiers of 51 Olivia Road v City of Johannesburg* 2008 ZACC 1 (CC) (S. Afr.).

Two days after the oral argument, the Constitutional Court reversed the judgment of the Supreme Court of Appeal and issued an interim order, requiring the parties to “engage with each other meaningfully . . . in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.”¹¹⁴ The court observed that the city had constitutional obligations to the people, most importantly, the right to human dignity and the right to life, and that “[i]n the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.”¹¹⁵ The parties filed affidavits with the court that outlined the settlement agreement. “The agreement ma[de] explicit and meticulous provision for measures aimed at rendering both properties ‘safer and more habitable’ in the interim[, including] . . . the installation of chemical toilets, the cleaning and sanitation of the buildings, the delivery of refuse bags, the closing of a certain lift shaft and the installation of fire extinguishers.”¹¹⁶ In addition, the city government agreed to work with the residents on the development of permanent housing solutions.¹¹⁷ The court approved the settlement. This case was significant, as the court found that the constitution required the government to “meaningfully engage” with citizens, and that the court’s job was to determine whether or not there was “meaningful engagement” between a city and the resident about to be rendered homeless when hearing a challenge under section 26 of the constitution.¹¹⁸

3. Positive Action or Specific Measures for Vulnerable Populations

The *Case of Government of Republic of South Africa vs Grootboom* was important in underling, by the Court, that Section 26 of the South African Constitution that explicitly requires the state to take reasonable legislative or other measures to achieve the progressive realization of housing rights. The court ruled that specific measures should be taken for certain vulnerable populations; in *Grootboom*, the highlighted vulnerable group was the group living in “intolerable conditions of crisis situations.” Since *Grootboom*, the South African government has taken and implemented special measures for several vulnerable populations. For instance, Parliament enacted the Promotion of Equality and Prevention of

¹¹⁴*Id.*; Brian Ray, *Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through ‘Engagement,’* Oct. 13, 2008, HUMAN RIGHTS LAW REVIEW, available at <http://hrllr.oxfordjournals.org/cgi/content/full/ngno25?ijkey=WhA0qNJYplLZZAp&keytype=ref#FN10>.

¹¹⁵*Occupiers of 51 Olivia Road v City of Johannesburg* 2008 ZACC 1 (CC) (S. Afr.).

¹¹⁶*Id.*

¹¹⁷*Id.*

¹¹⁸*Id.*

Unfair Discrimination Act in 2000, giving people with disabilities the opportunity to challenge unfair discrimination by the public and private sectors. Under a Housing Subsidy Scheme, the state provides grants to certain qualifying beneficiaries, dependent on household income, to acquire tenure and basic services.¹¹⁹ In addition to the Housing Subsidy Scheme, there are many other subsidies available, including institutional subsidies available for qualified institutions to allow them to build affordable housing for individuals that qualify for housing subsidies.¹²⁰

¹¹⁹Knight, *supra* note 91.

¹²⁰*Id.*

IV. Recommendations

Due to its international commitments and constitutional provisions Iraq should consider creating a national legal framework protecting the right to adequate housing for its citizens. Iraq's Constitution enshrined the right to adequate housing for all Iraqis and especially it for vulnerable population. Article 30 provides that "[t]he State shall guarantee to the individual and the family – especially children and women – social and health security, the basic requirements for living a free and decent life, and shall secure for them suitable income and appropriate housing." Moreover, the constitution states that "[t]he State shall guarantee social and health security to Iraqis in cases of old age, sickness, employment disability, homelessness, orphan hood, or unemployment, shall work to protect them from ignorance, fear and poverty, and shall provide them housing and special programs of care and rehabilitation, and this shall be regulated by law."

The Iraqi Government should consider enacting laws to ensure that vulnerable groups can enjoy this particular constitutional right. Iraq's Government should consider the following recommendations:

1. Define the term "appropriate housing" according to the General Comment No. 4 of the United Nations Committee on Economic, Social and Cultural Rights. The definition is extensive and touches upon all the elements necessary to make housing adequate: (1) security of tenure; (2) availability of services, materials, facilities, and infrastructure; (3) affordability; (4) habitability; (5) accessibility; (6) location; (7) cultural adequacy.
2. Enact specific legislation to enforce the implementation of Iraqi citizen's constitutional right to appropriate housing specifically detailing how the government will fulfill its affirmative obligation in providing access to housing, policies, institutional framework, share of responsibility between local, regional and national governments, tools, mechanisms. Iraq may study best practices detailed in Section III of these paper. Like Spain, Iraq may want to create a minimum land reserve for subsidized housing, or like Scotland, may want to create "a right to temporary accommodation for homeless people, which for most individuals will transition into a permanent housing solution." Some other considerations include: public housing assistance programs where the government provides financial and non-financial assistance to rent, purchase and rehabilitate public housing units, and establishes maximum rental and sale prices; or develop programs based on partnership between the governments and civil society (non-governmental organizations), placing homeless individuals into affordable housing.
3. Include negative obligations and rights in Iraq's legislation. Include prohibiting arbitrary evictions, and protect those who are evicted. Iraq may take into consideration South Africa and Scotland when drafting its legislation. South

Africa strictly prohibits evictions “without an order of court made after considering all the relevant circumstances”, while Scotland allows for evictions on proper grounds, but requires landlords to notify local housing authorities when tenants are being evicted, so the authorities may focus resources on those particular tenants.

4. Create a system of fair and effective adjudication of economic, social, and cultural rights, specifically housing rights, by creating a judicial system responding to this need. Like South Africa, Iraq could choose “a middle position for its jurisprudence, encompassing legislative deference, a reasonableness standard, and rejection of the unrestricted enforcement of unlimited textual rights.”¹²¹

5. Develop policies; take measures and actions based on the principle of positive discrimination, responding to the specific needs of and for the benefit of different vulnerable groups.

Iraq may consider:

- adopting policies that allow for priority access to public housing or referrals to specialized shelters;
- creating a Housing Subsidy Scheme providing grants to qualified beneficiaries for acquiring secure tenure and basic services; providing qualified institutions with subsidies to build affordable housing;
- creating laws to support groups that have been historically discriminated against;
- Creating housing offices in accessible regions of the country to help targeted members of vulnerable populations.

Conclusion

During its period of reconstruction and redevelopment, Iraq has the opportunity to establish basic housing rights for its citizens and residents, specifically those who are members of Iraq’s vulnerable populations. Iraq has a responsibility to provide these basic housing rights, not only because it is a party to international legal agreements, and it has enshrined the rights in its constitution, but also because this right is fundamental to human dignity.

¹²¹*Id.* at 17.