The Implementation of Socio-Economic Rights in South Africa — A Meta-Analysis

Lebohang Clyde Seleoane

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Supervisor: Professor Johann Mouton
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I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

ABSTRACT

Socio-economic rights are the subject of much debate in South Africa and elsewhere. At first they were simply denied the status of any rights at all. Lately, there is a fair amount of recognition for them as rights. The tendency is, however, to relegate them to paper rights and invest very little effort in bringing about their actual realisation.

In this thesis I inquire into the question of what a human right, properly so called, is, and then whether, in the light of that inquiry, there is a basis for the reluctance to embrace socio-economic rights.

South Africa is uniquely fortunate in having a constitution that gives recognition to socio-economic rights and requiring the Human Rights Commission to monitor their implementation. But again there is a risk that the recognition of socio-economic rights is left as a constitutional matter, and nothing or little is done for their practical implementation.

Therefore I inquire into the manner in which the Human Rights Commission monitors the implementation of these rights. The inquiry into the Human Rights Commission's monitoring role is largely a question of methodology. Whether, in other words, the methods of the Commission are such as to yield reliable information on the subject.

I also inquire whether the government's budgetary allocations indicate a serious approach to these rights. The budgetary allocations that are brought under the microscope relate to the seven core rights enshrined in the constitution, namely, housing, health care, food, water, social security, education, and environmental rights.

ABSTRAK

Sosio-ekonomiese regte is die onderwerp van vele debatte in Suid-Afrika en elders. Aanvanklik was daar nie erkenning gegee aan die status van hierdie regte nie. Hierdie situasie het die afgelope tyd begin verander. Die tendens is egter steeds om dit te sien as regte slegs op papier en daar word nie 'n poging aangewend vir die realisering van hierdie regte nie.

Ek ondersoek in hierdie tesis die kwessie van wat 'n mensereg, korrek so genoem, is en ook of, in die lig van hierdie ondersoek, daar 'n basis is vir die huiwering om sosio-ekonomiese regte te aanvaar.

Suid-Afrika is uniek in die sin dat die konstitusie erkenning gee aan sosio-ekonomiese regte en die Waarheid-en Versoeningskommissie opdrag gegee het om die implementering daarvan te monitor. Daar is egter weereens die risiko dat die erkenning van sosio-ekonomiese regte slegs gesien word as 'n konstitusionele aangeleentheid en dat niks of baie min gedoen word rakende die praktiese implementering daarvan.

Ek stel daarom ook ondersoek in na die wyse waarop die Menseregtekommissie die implementering van hierdie regte moniteer. Die ondersoek na die monitering van die Menseregtekommissie is hoofsaaklik metodologies van aard; dus of die metodes wat gebruik is, deur die Menseregtekommissie, betroubare inligting verskaf.

Ek ondersoek ook of die regering se begrotingallokasies 'n ernstige ingesteldheid jeens hierdie regte toon. Die begrotingsaspekte wat ondersoek word hou verband met die sewe kernregte soos vervat in die konstitusie naamlik behuising, gesondheidsorg, voedsel, water, sosiale sekuriteit, opvoeding en omgewingsregte.

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List of Abbreviations and Acronyms

ANC	African National Congress
AZT	Azidothymidine
C A S E	Community Agency for Social Enquiry
CGE	Commission on Gender Equality
CLC	Community Law Centre
DEAT	Department of Environmental Affairs and Tourism
ECOSCO	Economic and Social Council
ESR	Economic and Social Rights
GDP	Gross Domestic Product
GJMC	Greater Johannesburg Metropolitan Council
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NEDLAC	National Economic Development and Labour Council
NGO	Non-Governmental Organisation
SAHRC	South African Human Rights Commission
SAIRR	South African Institute of Race Relations
SANGOCO	South African Non-Governmental Organisations Coalition
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USSR	Union of Soviet Socialist Republics

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Chapter 1
Introduction to the Study

1.1 Background

South Africa held its first non-racial election on 27 April 1994. The election was important because it ushered in a non-racial democracy as well as a government that proclaimed its commitment to the economic upliftment of ordinary people. In his inaugural parliamentary address on 24 May 1994, President Nelson Mandela, as he then was, stated:

> My government's commitment to create a people-centred society of liberty binds us to the pursuit of the goals of *freedom from want, freedom from hunger, freedom from deprivation*, freedom from ignorance, freedom from suppression and freedom from fear. These freedoms are fundamental to the guarantee of dignity. They will therefore constitute a part of the centrepiece of what the Government will seek to achieve.[1] (Emphasis added.)

In order to deal with the legacy of racial discrimination and to correct the social imbalances it created, the constitution of South Africa:

- Commits the state to "[i]mprove the quality of life of all citizens";[2]
- Obliges the state to respect, promote and fulfil the social and economic rights of the citizens;[3]
- Assigns the South African Human Rights Commission (SAHRC) the task to monitor whether government departments and other organs of state are introducing any measures towards the realisation of social and economic rights;[4]

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1 *White Paper on Science and Technology*, preamble, p. 3. An examination of the *Science and Technology White Paper, Reconstruction and Development Programme White Paper, Growth and Development Strategy, Growth, Employment and Redistribution Strategy, White Paper on South African Land Policy*, and *White Paper on Affirmative Action* would confirm that at policy level the government is indeed committed to the sentiments expressed by Mandela.

2 *Act 108/1996*: preamble.

3 *Act 108/1996/24(b)(iii); 26; 27 & 29.*

4 *Act 108/1996/184(3).* It may be noted that *section 184(2)(b)* of the constitution empowers the SAHRC to "take steps to secure appropriate redress where human rights have been violated". In principle there is no distinction between the rights here under consideration and civil and political rights, insofar as the SAHRC has the right and power to take remedial action. Consequently, the SAHRC has the right to take action where socio-economic rights have been violated. It is suggested that the question is more likely to be: **When is a socio-economic right violated?** rather than: **Can the SAHRC come to the assistance of the citizen when his/her socio-economic rights are violated**? And then it is also important to note that the *Human Rights Commission Act*, 54/1994/7(e) empowers the SAHRC, in doing its work, to institute proceedings in any competent court or tribunal, in its own name or on behalf of aggrieved persons, where any of the rights here under discussion is infringed.

- Provides for all spheres of government to contract for goods or services on such a basis that they protect and/or advance persons or categories of persons who have been disadvantaged by unfair discrimination;[5]
- Provides for affirmative action;[6]
- Commits the state to land reform and to bringing "about equitable access to all South Africa's natural resources".[7]

South Africa signed the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) on 3 October 1994.[8] The ICESCR will be discussed in due course. Suffice it now merely to state that it is "the major international treaty protecting economic and social rights".[9] It is clear, therefore, that the government that was ushered in by way of the 1994 election made a commitment to the ideal of socio-economic justice.

1.2 Aim of Study

This study seeks to inquire into the articulation of theory and practice in the commitment towards the respect, promotion and realisation of socio-economic rights in South Africa. In other words, this study will inquire whether the socio-economic rights listed in the Bill of Rights were given effect to in the period considered by the SAHRC in 1988. It also seeks to understand the processes and procedures followed by the South African Human Rights Commission (SAHRC) in carrying out its constitutional mandate to monitor the implementation of socio-economic rights in South Africa.

There is a long-standing reservation about whether socio-economic rights are of the same order as civil and political rights. Although there is a move away from the tendency to question the *bona fides* of socio-economic rights, their recognition has tended to be half-hearted. Therefore, in Chapter 2, I shall inquire into what human rights, properly so called, are. I shall use that exercise as a basis, in Chapter 3, for inquiring whether socio-economic rights deserve to be approached with circumspection. In Chapter 4, I shall inquire into the

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5 *Act 108/1996/217(2). Subsection 3* directs Parliament to pass legislation to "prescribe a framework within which the policy referred to in subsection 2 may be implemented".

6 *Act 108/1996/9(2).*

7 *Act 108/1996/25(4). Subsection (5)* directs Parliament to pass legislation "to foster conditions which enable citizens to gain access to land on an equitable basis".

8 Department of Foreign Affairs, *Position with Regard to Human Rights Treaties*, n.d., p. 1. (The document was distributed by the Department of Foreign Affairs on the occasion of the 50th anniversary of the UDHR on 10 December 1998.)

9 Alston, 1998, p. 2.

methodological strengths and weaknesses of a study conducted by the SAHRC into the implementation of socio-economic rights in South Africa. In Chapter 5, I shall examine the findings of the SAHRC's study and in Chapter 6 I shall draw some conclusions.

In this study I shall:

- Search for, and try and assign meaning to, variations in the texts that I shall be working with;
- Try and be as attentive as possible to detail in the texts that I shall be working with;
- Inquire into the manner in which these texts are designed to undermine alternative views; and
- Try and build up a case for socio-economic rights.

1.3 Methodology

The methodology I propose to follow in this study is *meta-analysis*. That is, I propose to analyse the SAHRC's analysis[10] of the data it gathered in 1998. The data were gathered with a view to examining whether, and to what extent the state is fulfilling its constitutional obligation to give effect to socio-economic rights in South Africa.

It is, perhaps, necessary to try and justify my choice of meta-analysis as a methodology for this study. There are, I believe, two levels at which it might be necessary to justify my methodological choice. Firstly, what stands to be gained by approaching the study via meta-analysis? And, secondly, one has, perhaps, to justify the appropriateness of the methodology to the study.

Social science has been under attack for its failure to be conclusive on the subjects it studies for many years now.[11] The effect of this has been, by and large, to undermine confidence in the social sciences since, in lieu of answering the questions posed at the beginning of the study, social research findings have tended to raise more questions. Not only has this tendency created a lot of confusion: it also brought into question the utility of social research.[12]

Social scientists came to a point where they found the need to try and make sense of the "vast amounts of research findings" at hand, rather than do further primary research.[13] With reference to the current study, I hope to show that the SAHRC's analysis of the data it

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[10] Glass G, cited by Wolf FM, 1986, p 11.

[11] Hunter JE & Schmidt FL, 1990, p 35; Wolf FM, *supra*, pp 9-10.

[12] Hunter JE & Schmidt FL, *supra*, pp 35-37.

worked with had some serious limitations. I hope to show that these limitations might well have the effect of obfuscating the reality that it was meant to illuminate.

Further, in reading a research report, one has to decide whether, and to what extent, one can "invest trust" in what one reads.[14] The question falls to be decided by a variety of factors, including the credentials of the researcher who wrote the report; the way the research was conducted and the data analysed; the "level of consensus among other scholars in the same field" on the findings; and the independence of the researcher.[15]

Therefore I propose to inquire whether the SAHRC's study satisfies the standard of credibility, both at the level of data gathering and data analysis.

The second consideration in respect of which it is necessary to justify my choice of methodology is the appropriateness of meta-analysis to the study. If we say that meta-analysis seeks to make sense of "vast amounts of research findings", to what extent is it still appropriate to the current study? What "vast amounts of research findings" are there in South Africa in order to warrant meta-analysis thereof?

The SAHRC inquiry forming the subject-matter of this study was the first of its kind. There were other studies on the matter, notably by the South African Institute of Race Relations, the Human Rights Committee and Fair Share. Admittedly they were not of the same scope as the SAHRC study, but they traversed more or less the same ground. Their findings were not always the same. I shall argue that, in failing to take them into account, the SAHRC impoverished its analysis of its own data.

I take, moreover, the view that "vast amounts" is an elastic term. It is noteworthy, for instance, that Cook *et al*, previously referred to, write instead about "all the studies relevant to an issue".[16] Locke *et al*, also previously referred to, speak variously of combining "studies that have the same focus" and of "combining the results from independent studies".[17] Therefore, it seems to me, meta-analysis would be appropriate to the current study notwithstanding the fact that it is not yet possible in the context of South Africa to speak about tons of research findings on the state's fulfilment of socio-economic rights.

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[13] *Ibid*, p 37; Hunter JE, Schmidt FL & Jackson GB, 1982, p 10; Cook TD *et al*, 1992, p 4.
[14] Locke LF, Silverman SJ & Spirduso WW, 1998, p 29.
[15] Locke LF, *et al*, *supra*, pp 30 & 42; 45-48; 37; 50-51 respectively.
[16] Cook TD *et al*, *supra*, p 5.
[17] Locke LF *et al*, *supra*, p 137.

Chapter 2
What is a Human Right?

2.1 The Bill of Rights

For many, it may seem fairly straightforward what a human right is. We might, for example, do what lawyers are very good at, and say that a human right is any right that a person has in terms of the Bill of Rights.[1] However there are problems about this.

The first problem is one of logical construction. Logic scholars would say that one cannot define a concept by means of the very terms that one is required to define. Therefore it is illogical to include the term "right" in the definition of the term "human right" unless one has already defined the term "right" separately.

Maurice Cranston wants to break away from this circularity where he writes:

> [T]here is a sense in which to have a right is to have something which is conceded and enforced by the law of the realm. To say that I have a right to leave the country, a right to vote in parliamentary elections, a right to bequeath my estate to anyone I choose, is to say that I live under a government which allows me to do these things, and will come to my aid if anyone tries to stop me.[2]

Cranston refers to rights such as these as "positive rights" because "they are recognised by positive law, the actual law of actual states".[3] I think that Cranston's formulation is more helpful in that he does not say a right is a right. He argues that a right is a claim that you make against something in the expectation that the state will come to your assistance, should that be required. But Cranston's formulation leads us to the second problem about the lawyer's conception of human rights. In order to make the statement that a human right is

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1 See, e.g., Malan, 1996, pp. E1 – 3 & 4. I believe that this approach is also implicit in Lindholm, in Arnegaard & Landfald (eds), 1998, pp. 12-13. Lindholm writes that people's freedoms and dignity should be protected "by means of universal legal rights to be called 'human rights', citing, as it were, the Universal Declaration of Human Rights preamble. The problem, of course, is not with the requirement that such freedoms and dignity be protected by law. The problem relates to the fact that these rights, which are so protected, *must be called human rights*. What Lindholm says, and in quite so many words, is that *legal rights* constitute *human rights*. See also Eisler, 1987, p. 288; Bokor-Szegö, 1991, p. 25, footnote 21. Bokor-Szegö cites the *Hungarian Encyclopedia of Law* to the effect that a "fundamental *right* means those individual *rights* of citizens which should protect civil liberty and equality before the law ..." Therefore these writers, in the first place, define a human right in a circular way. In effect they say a right is a right. And then, in the second place, they say a right is what the law says it is.

2 Cranston, 1973, p. 4.

3 *Ibid*, p. 5.

what the law says, one has to overcome the argument that a right is logically prior to any law. Montesquieu formulated the matter in the following instructive words:

> Before laws were made, there were relations of possible justice. To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal.[4]

In order to make the argument that Cranston makes, one has to overcome the problem that we assert our rights the more so in those situations where the law denies them. Marie-Bènèdicte Dembour argues:

> As soon as you try to capture something, for example by putting it on paper, it is because you have already lost it ... Very often, constitutional documents present themselves as constituting a break from the past. In fact, they follow directly from the past. They arise because things can no more be taken for granted, because values and attitudes do not go without saying any more. In this sense, each declaration of rights encompasses a loss, as well as a promise.[5]

The *Dèclaration des droits de l'homme et du citoyen*, 1793, specifically stated, with reference to the rights to express one's opinions and thoughts, to hold meetings and to subscribe to whatever religion one chooses, that "[t]he necessity of proclaiming these *rights* presupposes either the existence or the recent memory of despotism".[6] But for the fact that he considers the law as the source of rights, AV Dicey came very close to this position where he wrote:

> [T]he law of the constitution, the rules which ... form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.[7]

On this conception, we do not have rights because the constitution says so, although it makes our lives a lot easier if the constitution recognises our rights. On the contrary, the constitution proclaims our rights because we already have them. It is interesting to note that the interim constitution stipulated that in limiting any right entrenched in the Bill of Rights, the law

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4 Montesquieu, 1949, p. 2.

5 Dembour, in Arnegaard & Landfald, *supra*, p. 168. See also Mbaya, in Eide & Hagtvet (eds), 1995, p. 65. On p. 74, Mbaya (1995) specifically argues that the "non-exercise of a duty [should under no circumstances] be used as an excuse to suspend or abrogate a right". See further Asbjørn Eide, in Eide & Hagtvet, *supra*, p. 6.

6 Marx, 1975, p. 161.

"shall not negate the *essential content* of the right in question". [8] It is obvious, of course, that the interim constitution contemplated only the rights that it entrenched, and no other rights. Equally obvious, however, is the fact that the interim constitution did not define the *essential content* of the rights it entrenched. It left that for the courts. It would not be unreasonable in my view to suppose that the interim constitution recognised the fact that the essential content of those rights is, to borrow a term from Lone Lindholt, "supra-regulatory". Therefore it is not something that one casts in legal terms once and for all times.

Although the importance of this statement might not be instantly obvious, I suggest that its profundity is established by the preceding discussion. If we have rights because the constitution proclaims them, we can have only as many rights as it proclaims. We can have no principle argument with despots when they ensure that the constitution proclaims few or no rights.

This is the distinction, in the end, between a positivistic and a normative approach to human rights. The positivist will assert that we have those rights only that already are embodied in law. The normativist will assert that we are entitled to those rights, too, that the law does not yet recognise. In my view the weight of opinion in the human rights discourse favours a normative approach to human rights, rather than a positivist one. And there are good reasons for that. But to accept the proposition that we have rights before the constitution or the law proclaims them merely invites the question again: w*hat is a human right?*

2.2 The Universal Declaration of Human Rights

Faced, now, with such a problem, we may wish to fall back on the Universal Declaration of Human Rights (UDHR) and all the other international human rights instruments. We may wish to argue that human rights derive from these instruments whether or not individual countries pass legislation to that effect.[9]

My view is that this approach would not shift the inquiry much further. All it does is to shift the problem from the national level to the international sphere. The fundamental

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7 Dicey, 1965, p. 203.

8 *Act 200/1993/33(i)(b).* This stipulation is not part of the current constitution. However in *State v Makwanyane and Mchunu* 1995 3 SA 391 (CC) the Constitutional Court was firm in the view that a right could not be limited in a manner that negated its essential content. Although this judgement was made in terms of the interim constitution, it is doubtful that the courts might accept a limitation of a right under *section 36* of the current constitution if it denies the essential content of the right — see Malan, *supra*, pp. E1 — 7 & 10 *et seq*.

9 See Pienaar & Liebenberg, in Schutte, Liebenberg & Minnaar, 1998, p. 413. Although the authors suggest that human rights existed before the UDHR, they still attribute them to documents such as the *Magna Carta* and the *British Bill of Rights* of 1688.

question as to what a human right is, remains unanswered. It is by no means clear to me that if the question was valid in the national domain, its validity disappears by the sheer act of internationalising the subject.

It is significant that Dembour and Mbaya cite international human rights instruments as examples of the point they are making. They argue, for instance, that the extent of human rights violations during World War II inspired the drawing up of the UDHR.[10] If it is so, it must remain possible to ask even at this stage, *what is a human right?*

I do not find the cataloguing of rights a useful manner of answering the question at hand. One could, in my view, accept the catalogue, but legitimately still ask the original question. In other words, why are life, freedom of expression, administrative justice and all the other rights mentioned in our Bill of Rights and in the UDHR human rights? From a philosophical standpoint, a document does not justify itself. Therefore the mere fact that the UDHR says so, does not seal the debate. Quite the contrary, it invites the question: w*hy does the UDHR say so?* [11]

2.3 Natural Law

Tore Lindholm suggests that the term "human rights" hardly formed part of the English vocabulary until after World War II. "Natural rights" and the "rights of man" were more current terms.[12] Cranston suggests that the term "human rights" might in some sense be ascribable to Winston Churchill. When the United Nations was formed, Cranston writes, "one of the first and most important tasks assigned to it was what Winston Churchill called 'the enthronement of human rights'".[13]

For current purposes I suggest that the pre-World War II terminology implies the source of human rights — or the "rights of man", as they were called at the time. An examination of the writings of some philosophers in the 18th and 19th centuries would reveal that they perceived the "rights of man" as springing from nature.

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[10] See also Pienaar & Liebenberg *op cit*, *loc cit*. And see, indeed, the UDHR preamble which leaves no doubt that the UDHR was drawn up as a result of "disregard and contempt for human rights" and that the said disregard and contempt led to "barbarous acts which have outraged the conscience of mankind". It further recognises "the inherent dignity" of the person and so does not claim to be the author of such dignity.

[11] See, for example, Marx, *supra*, p. 162, where Marx explores the meaning of the term "rights of man" as it is used in the *Dèclaration du droit de l'homme et du citoyen*.

[12] Lindholm, in Arnegaard & Landfald, *supra*, p. 15; Cranston, *supra,* p. 1. See, indeed, the French *Dèclaration du droit de l'homme et du citoyen* of 1789, 1791 and 1793; and the *Virginia Bill of Rights* of 1776.

[13] Cranston, *supra*, p. 3.

In *Leviathan* Hobbes wrote that freedom could only flourish in circumstances where the ruler has absolute power and the subjects unhesitatingly submit to his authority. He approached the question in more or less the same manner in *Elements of Law*, where he argued for undivided sovereignty. He was of the view that, in his *natural* state, "man" was warlike and therefore lived in constant fear. The only way in which "man" would enjoy freedom, so Hobbes argued, was to tame his natural propensity for war by subjecting him to the absolute power of the sovereign. Thus, although Hobbes argued a fundamentally undemocratic proposition, he presented it nevertheless as the framework within which freedom was possible. And nature, man's natural propensity for war, was the plank on which he built his theory of the state and, thus, of civil liberties.[14]

In *The Two Treatises of Government* Locke proceeded on a premise diametrically opposed to Hobbes. He argued that, contrary to Hobbes, "man" in his natural state was happy and peaceful. "Man" had, yes, some inconveniences, which included lack of clear rules. To solve these, he entered into a "social contract" as a result of which the sovereignty was established. It was inconceivable, therefore, that the sovereign, being the product of a voluntary contract of free men, could now have absolute power over them.[15] But in any event, Locke argued, the notion of an absolute sovereign was incompatible with the *laws of nature* which impose limits on everyone willy nilly, including the sovereign.[16]

Montesquieu argued in *The Spirit of the Laws* that the nature of a country determined what form of government was best suited for that country. In *Emile* Rousseau argued that children are naturally good and that, therefore, they should be given freedom. In *The Social Contract* he argued that liberty is as important to the human being as fresh air.

It is possible to cite other philosophers who wrote in this period. It seems clear that the view of a significant body of thinkers in the period held the view that rights are given by nature. The documents on the "rights of man" that were produced at the time also proceeded on the basis that these rights are given by nature. I have already referred to some of these, and wish to add just two more. The *Constitution of New Hampshire* stated in *Articles* 5 and 6 that

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[14] See Berki, 1977, pp. 132-140; Cranston, *supra*, pp. 25-26; Eide & Hagtvet, *supra*, pp. 8-9.

[15] See Harpham, 1992, pp. 15-29; Eide & Hagtvet, *supra*, pp. 9-10; Berki, *supra*, pp. 142-150.

[16] Duguit in *Archives de philosopie du droit*, cited by George Whitecross Paton, made a very similar argument, save that he was opposed to an *a priori* approach to law and to rights. See Derham (ed.), 1964, p. 89. Duguit argues that the foundation of the law is not the individual's rights. Law arises because people live together and it is essential to regulate their relations. Neither, as Duguit saw it, does law depend on the will of the sovereign, who is himself "bound hand and foot by a law which he cannot change".

some of "these natural rights" are "by nature inalienable since nothing can replace them". The *Constitution of Pennsylvania* stated in *Article* 9:

> All men have received from nature the imprescriptible right to worship the Almighty according to the dictates of their conscience, and no one can be legally compelled to follow, establish or support against his will any religion or religious ministry. No human authority can, in any circumstances, intervene in a matter of conscience or control the forces of the soul.[17]

Dembour writes that even in our times the concept of human rights emanates from natural law theories, since it is "conceived as being 'inherent' to the human person".[18] This view received, in South Africa, the unequivocal endorsement of John Dugard, on all accounts a distinguished jurist. He cites Gustav Radbruch where the latter writes:

> When laws consciously deny the will to achieve justice, for instance if they grant or retract human rights from people according to arbitrary caprice, such laws are devoid of validity, and the people owe them no obedience and even lawyers must then find the courage to deny them the nature of law.[19]

Dugard then comments:

> This idea, that a law contrary to the principles of natural law is not a law, has impeccable jurisprudential roots and finds support in the writings of Cicero, St. Thomas Acquinas, and Grotius. In recent times it has received endorsement in a limited form from the American jurist, Lon Fuller of Harvard.[20]

If that is accepted, it might provide an escape from the absurdity of ascribing human rights to the law in circumstances where the evidence seems to suggest that human rights are logically prior to the law. We would not, then, have to explain where human rights come from when faced with regimes whose laws constitute a denial of human rights.

In fairness, however, one must state that the theory of *natural rights* has also been clouded by much controversy. Hegel argued, for instance, that the notion of natural rights is defective to the extent that it is contingent upon the concept of natural man. And the problem about the concept of natural man was that it is arrived at by a level of abstraction that

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[17] Both constitutions cited by Marx, *supra*, p. 161.

[18] Dembour, *supra*, p. 153. See, indeed, the preamble to the UDHR and Article 6 of the International Covenant on Economic, Social and Cultural Rights.

[19] Dugard, 1978, p. 399.

[20] *Ibid.*

incorrectly leaves out of consideration the very factors that it should be analysing. Hegel wrote:

> [Locke and Hobbes degraded the individual by peeling away the layers of society and culture] until, finally, one comes by analysis to the abstraction called natural man. If one thinks away everything which might be regarded as particular or evanescent, such as what pertains to particular *mores*, history, culture, or even the state, then all that remains is man imagined as in the state of nature or else the pure abstraction of man with only his essential possibilities left.[21]

Bruno Bauer argued that there is nothing natural about the "rights of man" — i.e. they are not innate. They arise, he argued, out of the manner in which history evolves and in relation to concrete struggles by people. He wrote:

> For the Christian world, the idea of the rights of man was only discovered in the last century. It is not innate in men; on the contrary, it is gained only in a struggle against the historical traditions in which hitherto man was brought up. Thus the rights of man are not a gift of nature, not a legacy from past history, but the reward of the struggle against the accident of birth and against the privileges which up to now have been handed down by history from generation to generation. These rights are the result of culture, and only one who has earned and deserved them can possess them. [22]

Karl Marx attacked the theory of natural rights, calling it a façade for concealing the interests of those who owned and controlled the means of production. To the working class, on the other hand, the concept is like an empty shell since, without the means to enforce them, natural rights were of no consequence to them.[23]

Cranston argues that all talk about human rights, and thus the concept of natural rights, outside of positive law comes down to metaphysics. He writes:

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[21] Quoted by Cobbah, 1987, pp. 316-317. Cobbah cites Hinchman's elaboration on the point made by Hegel: "Hegel distinguishes between the characteristic Lockeian question, 'What is the *origin* of X' … and 'What is X'? What X is may in fact only come to light when we take into account the developed and articulated form of 'X', including all the supposedly contingent elements of history, custom, the state, etc.' which the state of nature approach peels away. In 'taking apart' existing society, studying its 'parts', then reconstructing it, Hobbes and Locke have left something out – not something accidental, but the very essence of man's social and political relationships. For this reason their project of grounding human rights in man's pre-political state appeared to Hegel fundamentally mistaken ... Only if one could purge human memory of everything not included in Hobbes's and Locke's state of nature, could one possibly re-condition men to think and act as the liberal theorists say they do ..." (*ibid.*)

[22] *Die Judenfrage*, 1843, cited by Marx, *supra*, p. 146.

> There is certainly something suspicious about the things which are said by many champions of natural law. Consider, for example, a remark made from the writings of the eighteenth-century jurist William Blackstone: "Natural law is binding all over the globe; no valid human laws have any validity if contrary to it". Now if the word "valid" means what it commonly means for lawyers, this statement is simply untrue. For by a valid law, lawyers commonly mean a law which is actually upheld and enforced by the courts, a law which is pronounced valid by a duly established judge. A great many laws contrary to natural law were upheld by courts in different parts of the globe in the eighteenth century when Blackstone wrote those words. For instance, there were the laws which authorised slavery, an institution which Blackstone himself regarded as being contrary to natural law. Laws even more at odds with natural law were upheld by duly constituted courts in Germany at the time of the Third Reich ...[24]

If Cranston had written this critique of natural law, and therefore of natural rights, before the Nuremberg Trials, there might be a point in engaging with the sentiments he expresses. But then he wrote it after the Nuremberg Trials, and it seems to me that the issue is fairly settled now: the Germans who enforced and upheld the positive law he refers to were called upon to answer to a higher order than the positive law they enforced.

But in any event Cranston misses Blackstone's point completely. The point about "valid human laws" being invalid when in conflict with natural law is precisely that judges must refuse to enforce such law![25] More recently, Dembour has made a more interesting critique of natural law and natural rights:

> Natural law [from whence spring natural rights] is a problematic idea … in that it assumes that everyone would arrive at the same conclusion as to what is natural … through adequate exercise of reason. But what appears natural to one person may not appear so natural to another. This is very clear when one considers different epochs and different societies. But even people belonging to the same society often hold different views on a particular issue. ... Examples which are often mentioned in this respect include the practice of slavery … and the subordination of women up to the end of the 20th century. If slaves were slaves

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[23] See Eide, *supra*, pp. 10-11.

[24] Cranston, *supra*, pp. 11-12.

[25] See Dugard, *op cit*, *loc cit*.

> and women subordinates, it was of course in accordance with their so-thought true nature with so-deemed biological facts.
>
> It appears that what is conceived as "natural" is often nothing else than what happens to be "mainstream". As a consequence, natural law theories can often be criticised for justifying the *status quo* by mistaking what is at the moment ... for what ought to be.[26]

These challenges to natural law, and thus to natural rights, are very significant. They remind us how all too often the ideologies and interests of people and of classes are sanitised, universalised and then presented as objective reality. They are a useful tool for analysing the conditions under which any claim is made about human rights.

But I am not sure that one can reject the notion of natural law and of natural rights completely on that account. First, I am of the view that it *is* possible to speak of natural rights in a non-metaphysical sense. (I shall return to this in a while.) Second, whilst it is true that the cost of enforcing rights does not favour the poor, it is also true that very often rights are respected without having to be enforced. Most of the time, for example, children do not litigate in order to compel their parents to raise them. Most parents consider it their natural duty to raise and protect their children. When the need arises for enforcement, the poor will undoubtedly be disadvantaged. But why should a person's rights be thought less of in those circumstances where they are respected without coercion? And, third, the discourse on human rights is bound to have an element of ideology, since it speaks to the manner in which people should be governed. The critics of natural rights theories are also influenced by their belief about how society should be ordered. As such, therefore, the intrusion of ideology in our definition of rights seems inevitable. Therefore, in stead of asking whether our conception of human rights is not influenced by ideology, it seems more useful to ask how we can define human rights so as not to be unduly restrictive, given the intrusion of ideology in our thoughts.

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[26] Arnegaard & Landfald, *supra*, pp. 153-154. See also Chimni, 1999, p. 338. Chimni is not here dealing with rights as such. He deals with *international law* and argues that it represents the interests of powerful nations and masks inequalities in international relations. He writes: "[The] international legal system possesses its own internal structure and dynamics which shapes its content and discourse. It develops ... only through certain organised 'sources of international law'. The particular form international law thus assumes defines its boundaries; anything falling outside it is designated as non-law. Its distinctive nature has served to sustain the status quo and prevent the substantive transformation of the content of international law in favour of third world states." Although this is not a direct attack on any theory of rights, it has a bearing on the attitude one must take towards international human rights instruments to the extent that they represent international law.

Once it is admitted that both the proponents and the opponents of natural law (and therefore also of natural rights) theories proceed from where they stand ideologically, we can try and shift the debate forward a little. We can try and find some common ground between the opposing schools. I think that Asbjørn Eide begins to move us in that direction where he writes:

> Ideological divisions on the issue of rights have dominated Western societies since the time of Marx, yet much of this controversy ought to have been overcome by the Universal Declaration. It transcends both Marxist and liberal ideologies in several ways: first, because the present human rights system includes both economic and social as well as civil and political rights; second, because it emphasizes that the full and free development of any person's personality is possible only when she or he forms part of a community and observes her or his duties to it. Collective sovereignty and individual autonomy ideally reinforce each other under the contemporary human rights systems.[27]

If we accept that the UDHR addresses some of the concerns raised by Dembour about natural law theories being *pro status quo*, and some of those raised by Marx, the question as to the meaning of the term "human right" still seems to me pertinent.

2.4 Human Rights as Human Needs

I incline towards the proposition that human rights should be defined in terms of human needs. Lone Lindholt formulates the matter in the following words:

> A more scholarly approach, seemingly a paradox, is one of defining human rights concepts according to human needs and basic principles rather than according to their legal form or subjects ... [T]his approach has the opposite effect of generalizing and narrowing down the scope of human rights to a handful of essential all-encompassing principles expressing basic human requirements.[28]

She also writes:

> In the centre[29] we find the *basic principles* of human rights, expressed as customary supra-regulatory norms and issues considered to be of such a vital

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[27] Eide, *supra*, p. 11.

[28] Lindholt, 1997, pp. 29-30.

[29] Of flat circles within circles representing rights in order to move away from a hierarchical view of rights.

> importance that they must be protected by international law. Examples hereof are the right to life and sustenance, freedom from violation of one's mental and physical integrity, the availability of opportunities to develop one's personal capacities, and access to form and maintain relationships with others at both an individual and collective level.[30]

In a similar vein, Johan Galtung writes:

> [A human right must be] conceived of as a norm, concerning, indeed protecting, the rock-bottom of human existence. There is a link to basic human needs which potentially would make human rights applicable to human beings everywhere.[31]

Galtung also argues that there must be "no hard, positivistic assumptions about the 'nature' of human rights except that ultimately they are supposed to serve basic human needs".[32] I find this approach appealing because, amongst others, it is not pretentious. It is down to earth in the fashion argued by George Whitecross Paton about law, namely that "it should not claim too lofty a justification for acts the reason for which is necessity rather than morality".[33] This approach suggests that as human beings we have certain needs and that, to ensure that they are not denied us, we express them as rights. And then we insist on their observance.

Further, this approach grounds the theory of natural rights and renders it less metaphysical. Human needs are natural.[34] If it is accepted that human rights are an expression of human needs, then the connection between human rights and nature becomes apparent. Because human needs are not static, human rights must also, if they are based on human needs, be dynamic.

It remains possible, however, to object to this conception of human rights too. I can well imagine that Dembour might argue validly that different people perceive human needs

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30 Lindholt, *supra*, p. 6.

31 Galtung, in Eide & Hagtvet, *supra*, p. 153.

32 *Ibid*, p. 154.

33 Derham (ed.), *supra*, p. 321.

34 Some may wish to argue that some rights are not natural in the sense argued above, and that they evolve, rather, out of the way in which history has progressed. An example of such rights might be the right to freedom of expression. In this regard, however, see Van der Westhuizen, 1994, in Van Wyk, Dugard, De Villiers & Davis, pp. 267-269. See especially p. 269, where he argues, "The desire to communicate … is an essential characteristic of human nature" and "Normal human beings want to speak, sing, write, or display colours and insignia ..." Van der Westhuizen then concludes, and I think rightly, that freedom of expression is a natural right. Note that he likens it to other civil and political rights and that, therefore, the naturalness of free expression is not peculiar.

differently. She might validly still confront us with the objection of "unwanted rights".[35] Although Dembour would in my view be correct, the validity of the approach must survive her. Allow me to elaborate.

I have already made reference to Asbjϕrn Eide, where he suggests that the UDHR somewhat bridges the ideological gulf between liberal and radical theories of human rights. Now, the question of enforcement, which Karl Marx argued, is still pertinent. It is still so that poor people lack the money and the know-how needed in order to enforce their rights. Therefore it would still be correct to argue that for them, the rights listed in the UDHR often do not bring a profound difference to the quality of their lives. As Hanna Bokor-Szëgo states it, albeit in a somewhat different context, the question is legitimate "whether a person lacking even rudimentary education is in a position to use his political rights consciously, in accordance with his interests".[36]

But the question about the content of these rights is a different matter. If one proceeds from the list of rights named in the UDHR[37] it seems to me that one can no longer argue that these rights as such are *pro status quo*. One can no longer argue that, as a body, they represent the interests of the owners of capital.

If that is accepted, then we cannot, it seems to me, raise the argument against these rights that, as a body, they are suspect because someone else might think differently about them. We could argue, to be sure, that it is possible to improve them and that the list should never be closed. That is a different matter.

And so is the question whether everyone they are available to, wants them. The fact that the rights are available to a person means that, if he/she chooses to exercise them, he/she can do so. If he/she chooses otherwise, they do not cease to be rights on that account. The whole thing is about choice. And even so, the efficacy of these rights is often independent of the

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[35] Dembour, 1998, pp. 156-157 refers to a study by Heather Montgomery with the title *Must Children have Rights they don't Want?* The study happens against the background of the *United Nations Convention on the Rights of the Child* of 1989. Among others, the Convention directs states to take measures "to protect the child from all forms of sexual exploitation and sexual abuse". In her study, Montgomery finds that prostitution can be a rational choice for the child prostitute. If they did not prostitute themselves, they might be forced by exigencies of life to engage in other economic activities which offer lower financial returns and which might expose them to other forms of harm. One 12-year old who was interviewed by Montgomery even hoped that, in the life hereafter, she might be rewarded "for looking after my parents" with the proceeds of prostitution. The question therefore arises whether people should be forced to have rights which they do not want — rights, in effect, which might impoverish them.

[36] Bokor-Szegö, *supra*, p. 22.

[37] The "protection" of which rights is "amplified" in, and based on, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*. (See Bokor-Szegö, *supra*, p. 29.)

choices we make. So, even if I thought nothing of my right to life, I continue to enjoy the protection afforded by that right because others take it seriously.

The children studied by Heather Montgomery might reject the rights the *United Nations Convention on the Rights of the Child* accords them in a given set of circumstances. They might invoke them in another. To attack the right because, in a given set of circumstances, the holder of the right disregards or waives it, would in my view not be a sound proposition. We do not always act consistently in respect of our rights, but that is not an adequate basis for questioning the validity of those rights *per se*.

In the end this is really a question about how society functions politically. Even if the people concerned under no circumstances welcomed the rights accorded them, those rights would in my view remain valid. A parallel can be found in Jean-Jacques Rousseau's reconciliation of freedom with democracy. He argues:

> The citizen gives his consent to all the laws, including those which are passed in spite of his opposition.... The constant will of all the members of the State is the general will; by virtue of it they are citizens and free. When in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will.... Each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so. If my particular opinion had carried the day, I should have achieved the opposite of what was my will; and it is in that case that I should not have been free.[38]

Rousseau's views have to be approached, needless to say, with a measure of circumspection. Things are not quite as simple as he suggests. It is not, for instance, always a matter of choice where one will reside. I think, however, that the fundamental point he makes is valid, namely that, in the normal course of events, the validity of a law is not threatened by the fact that some people reject it. If it is so, then the validity of a right embodied in a law is also not threatened by the fact that some people reject it.

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[38] Rousseau, 1973, p. 250.

2.5 The Law and Human Rights

Nothing I have said should be read to suggest that the law has no place in the discourse on human rights. It is quite obvious that the law has a tremendous impact on human rights. The question is therefore not whether the law is relevant in the human rights discourse — it clearly is. The issue is rather to understand what the law does when it proclaims rights.

The ideal relationship between human rights and the law is, in my view, analogous to the *Brownian movement* in physics. So seen, the law is like a liquid and people like particles moving around in the liquid. The liquid, which is the law, regulates their movement so that they do not collide. But at the same time it takes its shape from the particles whose movement it regulates. Every now and then it will expand according to the direction the people it regulates are pushing it and so, perhaps, recognise other rights. In order to prevent any collision, the law may occasionally withhold some rights. It may occasionally narrow the scope of some rights. But the purpose must at all times be to eliminate or to reduce the potential for collision. If the law withholds rights or reduces them for any other purpose, we resist that fact precisely because the rights do not derive from the law.

If we accept that rights are not the products of the law, and that we assert them even where the law denies them, we still have to operationalise them. We still have to define their scope and find ways to harmonise them. In my view that is the proper place of the law in the human rights discourse. The law, therefore, is like a medium in which and through which we enjoy and exercise our rights.

I suggested that this would be the ideal situation. In social life things are not nearly so neat. Unlike in the Brownian movement, collisions do occur in social life. Rodolfo Stavenhagen writes:

> While contemporary wisdom holds that all human rights are equally fundamental and none ranks higher than any other, in reality certain rights do hold priority over others. When conflicts between rights occur, the solution is more often than not neither technical nor moral, but political. In other words, conflicts seldom occur between rights in the abstract, but between holders or claimants of rights. The question is not so much which rights are in conflict, but who holds the rights and how much political (or military) power does he have to impose his claim. If such conflict occurs between individuals in a democratic polity, then usually the state has the means to impose a more or less satisfactory or fair solution. If, however, the conflict occurs between individual rights and collective rights, other than those

> of the state itself, or between holders of competing collective rights then solutions are not always easy and may lead to political showdowns.[39]

The place of the law is also, then, to mediate and arbitrate such conflicts as may arise in the course of enjoyment of our rights. In doing so, the law has to take into account the power dynamics involved in such conflicts, and ensure that they do not lead to injustice. Taking into account the power dynamics of the conflict includes ensuring that the outcome of the conflict is not determined purely and only by the means of the contesting parties.

2.6 Are Human Rights Unconditional?

There is a sense in which, by accepting, however remotely, the proposition that rights are given by nature, one is condemned to assert that they are therefore unconditional. They depend on nature, and on nature alone. John Locke, who is generally recognised as a leading theoretician on natural rights, wrote: "[T]he binding force of the law of nature is permanent, that is to say, there is no time when it would be lawful for a man to act against the precepts of this law." He also wrote that even though we do not always act according to the law of nature, that does not mean we are entitled to "act against the law".[40] Edward J Harpham comments: "In other words, there is no time in which an individual in the state of nature could entertain a hostile disposition toward others without violating the precepts of natural law."[41]

By Locke, therefore, it is clear that rights, even if it is accepted that they issue from nature, are not for that reason unconditional. They are qualified, in the first instance, by nature itself — one is not at liberty to do what the natural law forbids. And they are qualified, in the second instance, by our obligations to fellow human beings. Locke was influenced by his theological outlook to formulate our obligations to one another in the manner that he did.[42] However I think that it is possible to arrive at the same conclusion from a non-theological angle as well. It is a condition of our existence that we are in the world. And to be in the world, as Anita Craig would argue, is to be bodily placed before others[43] or, as Louis van Schaik might put it, to be in a state of human relationship.[44]

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[39] Stavenhagen, in Eide, *supra*, p. 150. See also Bokor-Szegö, *supra*, p. 25.

[40] See Harpham, *supra*, p. 22.

[41] *Ibid.*

[42] *Ibid*, *et seq.*

[43] Craig, 1997, p. 517. See also Macquarrie, 1972, pp. 88 & 92-96.

[44] Van Schaik, in Macnamara, 1977, p. 149.

Our bodiliness before others means that we are limited in what we can do by the presence of others. The human relationship we have with others means we have responsibilities to other human beings. The UDHR proclaims, indeed, that "[all human beings] are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".[45] Arguing the African case on human rights, Josiah Cobbah writes: "Even if man was originally in a pre-political condition, such a condition is inevitably replaced by a condition in which human beings give recognition to each other and recognize rights as correlative to duties."[46] Therefore we cannot have unconditional rights. And it is as well since, in the words of Rousseau, if every citizen could do just as s/he pleases, nobody would be free.[47]

I must hasten to add that I am not concerned here with Rousseau's implication that the limits the law sets to our rights are correct, a proposition I cannot lend unconditional support to. The correctness of any limits the law sets on our rights is something to be evaluated on a case-by-case basis, and I do not think that one can make *a priori* endorsements thereof. The view that I argue is that the limitation of our rights is an ontological matter. It flows from the way we are in the world. Therefore we cannot argue with integrity that in principle our rights ought to never get limited.

2.7 The Obligations of Human Rights

It is generally accepted that a right creates obligations for all those against whom it is claimed. These obligations may be borne by the state or by other persons, depending on whom the right is addressed to, and on the circumstances of every case. The nature of the obligation created by the right depends on the nature of the right itself, but it also depends on the terms in which the right is expressed. A right might impose an obligation to carry out a particular act, or to act in a particular way. It might impose an obligation to refrain from a particular act or from acting in a particular way.[48]

So conceived, rights create obligations for the addressee. What is not often grasped with much enthusiasm is that rights create obligations for their bearer as well. The UDHR states in Article 29 that:

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[45] UDHR, *Article* 1. See also Raz, 1989, in *Law and Philosophy*, 8(1), April, p. 15; Macquarrie, *supra*, pp. 209-214.

[46] Cobbah, *supra*, p. 318.

[47] Rousseau, *supra*, p. 150.

[48] See Bokor-Szegö, *supra*, pp. 28 & 29.

- Everyone has duties to the community in which one lives; and
- The rights enshrined in the UDHR should in no case be exercised in a manner contrary to the purposes and principles of the United Nations.

Both the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* stipulate in their preambles:

> Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and the observance of the rights recognised in the present Covenant.

In Article 5, both covenants direct the state as well as the individual to avoid actions the result of which might be the destruction of any right mentioned in the covenants. Bokor-Szegö has commented:

> In accordance with the global and national interests determined by the social and economic conditions of our age, in our days the selfish, egotistic man is replaced by the ideal man "having duties to other individuals and to the community to which he belongs" ... by a person who can make use of his rights only so as not to destroy any of the rights and freedoms of others ....[49]

Article 29 of the *African Charter on Human and Peoples' Rights* also conveys the notion that rights come with obligations for their bearer:

> Each person has the duty to preserve and respect his/her family, parents and nation. Each person must protect the security of his/her State and work for national solidarity and independence. Each person must work and pay lawful taxes, and promote positive African values and African unity.

It is possible to disagree about the specific obligations the Charter lays down for the bearer of a right, but that is not what we are concerned with here. It is crucial, especially in South Africa today, to cultivate a human rights culture that emphasises both conceptions of obligations. We have to insist on the obligations attending the addressees of our rights. As Joseph Raz writes:

> To assert a right is, as we know, to assert that the right-holder's interest is sufficient reason to hold another subject to a duty. The duty's purpose is to protect the interest of the right-holder. The protection of that interest is its *raison d'être*.

> The person subject to the duty is encumbered in the interest of the right-holder. Their relationship need not be adversarial in fact. ... But the relationship is confrontational in principle. The duty does not depend on any harmony of interests between the right-holder and the person subject to the duty. It exists regardless of the existence or absence of such harmony.[50]

But we must insist just as strongly on the duties imposed by those very rights on their bearers. No one must be allowed to use the rights they have in order to destroy the rights of others. And there is a sound philosophical basis for that insistence.

If we accept the proposition that our bodily existence in the world places us in a state of human relationship with others; that, as John Mbiti would say, "I am because we are, and because we are therefore I am,"[51] we must accept that those others have rights too. We must accept that their rights are as important to them as ours are to us. But even if we thought nothing about our own rights, we must be prepared to accept that other people's rights may mean the world to them, and that, therefore, we have obligations to them. These obligations flow, not so much from the law as from the method of our existence in the world. So seen, our obligations are an ontological matter. In the words of Maurice Cranston, "[t]o say that a man has a right ... is to convert that demand into a kind of moral imperative, that is, to impose on all men a reciprocal duty to abstain from injuring their neighbours".[52] As Hobbes saw it, this mutual obligation to refrain from injuring one another was a precondition for us to be in the world as we are. It is not possible to insist on the observance of our rights if we trample on the rights of others. It is sheer hypocrisy to pretend that a human rights culture can be built on any other foundation. Therefore the basis on which we can demand and expect that others will respect our rights, is that we ourselves are committed to respect the rights of others.

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[49] *Ibid*, p. 30.

[50] Raz, 1989, p. 8.

[51] Quoted by Cobbah, *supra*, p. 320.

[52] Cranston, *supra*, p. 25.

Chapter 3
Socio-Economic Rights

3.1 Background

3.1.1 The Universal Declaration of Human Rights

On 6 January 1941, Franklin D Roosevelt delivered his famous Four Freedoms Speech. He identified what he called the "four essential freedoms" as:

- Freedom of speech and expression;
- Freedom to worship God in one's own way;
- Freedom from want; and
- Freedom from fear.[1]

After naming each one of these freedoms, Roosevelt emphatically writes: "everywhere in the world". He argues that freedom from want translates to "economic understandings which will secure to every nation a healthy peace time life for its inhabitants". Lone Lindholt suggests that Roosevelt articulated, in these freedoms, the basis for a sound human rights approach. She suggests that Roosevelt's statement provides the "essential all-encompassing principles expressing basic human requirements" on which a human rights system can be built.[2]

Two important considerations flow from Roosevelt's statement. The first is that human rights are of universal application. The second is that economic justice belongs in the human rights domain. He suggests that world peace and the enjoyment of civil and political rights may well be contingent upon economic justice.

On 10 December 1948, the Universal Declaration of Human Rights (UDHR) was adopted, and it proclaims:

- The right to social security (Article 22);
- Economic, social and cultural rights indispensable for the person's dignity and the free development of his personality (Article 22);
- The right to fair labour practices (Article 23);

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1 US Information Service, n.d., *Living Documents of American History*, p. 71.

2 Lindholt, *supra*, p. 30.

- The right to a rest period for workers (Article 24);
- The right to an adequate standard of life, including food, clothing, housing, medical care, security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond the person's control (Article 25);
- The right to education (Article 26); and
- Cultural rights (Article 27).

Alongside these rights, the UDHR proclaims civil and political rights. It is noteworthy that the UDHR does not distinguish between civil and political rights on the one hand, and social and economic rights on the other.[3] Quite the contrary, it states that all these rights are "a common standard of achievement for all peoples and all nations" and directs every individual and every organ of society "to secure their universal and effective recognition and observance".

Similarly, the language of the UDHR does not in my view suggest that some rights should be privileged and others ranked somewhat lower. I am cognisant of Shadrack Gutto's suggestion that the expression of specific rights or freedoms in the UDHR "differs and may allow for different implementation or enforcement strategies and means" .[4]. In interpreting Gutto, I think that one should take note that the UDHR, unlike the ICESCR, states in every case that the person has a *right to X*. It does not say that the person has a *right of access to X*. Therefore the right is direct. *Article 22* of the UDHR, it is true, provides that the national effort to bring about the realisation of economic, social and cultural rights should be "in accordance with the organisation and resources of each State". Therefore it can be said that, according to the UDHR, the implementation of socio-economic rights is contingent upon the resources that the state has at its command.

However the same article implies a connection between socio-economic rights and civil and political rights where it speaks about "social and cultural rights" being "indispensable for [the person's] dignity and the free development of his personality". The statement in the UDHR preamble that states must secure the universal and effective recognition and observance of "these rights and freedoms by progressive measures" refers to all the rights listed in the Declaration. Therefore it cannot be a basis for ranking socio-economic rights lower than civil and political rights.

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[3] See Gutto, 1998, p. 86.

[4] *Ibid.*

In my view Gutto's reading of the UDHR is coloured by his reading of the International Covenant on Economic, Social and Cultural Rights (ICESCR). I am of the view that if the UDHR is read on its own terms, it is clear and does not imply a differential approach to the rights it proclaims. Now, of course, as I have already indicated, the ICESCR is supposed to give effect to the protection of the socio-economic rights enshrined in the UDHR. Therefore it would be understandable — it might even be essential — to read the UDHR against the ICESCR. But I think that, where one discusses the UDHR as such, it is important to read it on its own terms. On such a reading one must conclude that there is no textual support in the UDHR for the proposition that rights should be approached differentially. To only read the UDHR against the ICESCR and the International Covenant on Civil and Political Rights (ICCPR), and then proclaim that *that* is what it means, will impoverish our analysis. It will render us unable to appreciate the very case that Gutto is making out — viz. that the adoption of two human rights instruments by the United Nations was, in effect, the concretisation of ideological resistance to the injunctions of the UDHR on socio-economic rights.

3.1.2 Classifying Rights: International Covenant on Economic, Social and Cultural Rights

In any event it was not long before the custodians of the UDHR started classifying and ranking the rights it proclaimed. Gutto suggests that this classification and ranking was probably a function of the "bipolar ideological divisions within the United Nations".[5] The culmination of these ideological divisions was the adoption of two instruments on human rights — viz. the ICCPR and the ICESCR.[6] The ICCPR is not the subject matter of this study, and will therefore be referred to only if it is necessary for the purpose of making a specific point.

The ICESCR was adopted in 1966 and requires state parties to:

- Introduce measures for the progressive, though full, realisation of the rights recognised in the ICESCR, to the maximum of their available resources (Article 2(1));
- Recognise the right to:

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[5] Ibid, pp. 86-87. See also Alston, 1992, in Alston (ed.), pp. 474 & 485; Craven, 1995, pp. 194 -195.

[6] Gutto, *supra*, p 87.

- Work, which right means the state must provide vocational guidance and training programmes and techniques with a view to ensuring full and productive employment (Article 5(1));
- Fair wages and equal remuneration for work of equal value;
- A decent living for workers and their families;
- Safe and healthy working conditions;
- Equal opportunity for promotion at the workplace;
- Rest, leisure and a reasonable limitation of working hours. (Article7);
- Form and join trade unions and the right to go on strike (Article 8);
- Social security (Article 9);
- An adequate standard of living for everyone, which right includes the right to adequate food, clothing and housing (Article 11);
- The enjoyment of the highest attainable standard of physical and mental health (Article 12);
- Education (Articles13 & 14); and
- To take part in cultural life (Article 15).

3.1.3 Ranking Human Rights: Generations of Rights

Once human rights were carved into these two broad categories — civil and political rights on the one side and socio-economic rights on the other — the stage was set for a hierarchical ordering of human rights. And so it came to pass that human rights got divided into three generations. Civil and political rights came to be called first generation rights; social, cultural and economic rights second generation rights; and environmental rights third generation rights.[7]

Writers are not agreed on the origins of the division of human rights into generations.

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[7] Bokor-Szegö, *supra*, p. 20; De Villiers, in Van Wyk *et al.*, *supra*, p. 603; Mbaya, *supra*, p. 68. It is noteworthy that there does not seem to be consensus even on the question whether there are two or three generations. Shadrack Gutto, for instance, speaks about a bipolar approach where the division is simply between civil and political rights on the one hand, and economic, social and cultural rights on the other. (Gutto, *supra*, p. 86.) And then writers like Asbjǿrn Eide and Bernt Hagtvet noticeably omit to mention cultural rights in periodising human rights generations. It is further noteworthy that, where other writers speak about environmental rights, Asbjǿrn Eide and Bernt Hagtvet speak about solidarity rights. Therefore there is still a lot of clarification required both about the classification of rights into generations on the one hand, and the content of the classes of rights as such.

Asbjørn Eide and Bernt Hagtvet, in a footnote to Etienne-Richard Mbaya, write that the notion of three generations of rights was first proposed by Keba M'Baye of Senegal when he was the Director of UNESCO's Division on Peace and Human Rights. They suggest that the reasoning behind the classification was that civil and political rights were the first to emerge — in the 18th century. Social and economic rights, on the other hand, emerged in the 19th and first part of the 20th century. The 20th century, they write, was time for a third generation of rights to be recognised, namely solidarity rights.[8] Hanna Bokor-Szegö, on the other hand, writes that the notion of three generations of human rights was first introduced by K Vasak in *La dèclaration universelle des droits de l'homme, 30 ans apres* in 1977.[9]

It would appear, though, that M'Baye might have worked in the capacity referred to above in the 1980s.[10] If that is correct, it would appear that preference must be given to the ascription of the division toVasak, whose work appeared in 1977.

Whatever the origins of the notion, its effect was that only first generation rights came to be accepted as human rights properly so called.[11] Socio-economic rights, on the other hand, were deemed mere directive principles, pointing the direction for policy formulation, but were not binding at all on the state.[12] The reasons advanced for the reluctance to accept socio-economic rights as proper rights were, amongst others, the following:

- Whereas civil and political rights are self-executing, socio-economic rights "require legislative and other state actions".
- The implementation of socio-economic rights is the subject-matter of politics and not of law.
- Flowing from the reservation referred to above, it is improper for the courts to involve themselves with socio-economic rights. Such involvement, if there is to be one, will inevitably involve the courts in politics, and this should not be encouraged.
- Adjudicating over socio-economic rights will negate the *trias politica* doctrine, in terms of which the three arms of government — legislature, executive and judiciary — are separate and independent of one another. Court judgements will have this effect

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8 Mbaya, *ibid.*

9 Bokor-Szegö, *op cit, loc cit.*

10 Kumar C., South Wind: On the universality of the human rights discourse, in Lindholm, *supra*, p. 133.

11 Gutto, *supra*, p. 87.

12 De Villiers, *supra*, pp. 614-621; Davis, 1992, pp. 475 *et seq.*

because, in ordering the state to fulfil socio-economic rights, the courts will effectively be determining the appropriation and application of the budget.

- Socio-economic rights are programmatic in nature and therefore not capable of immediate realisation.[13]
- Issues around affordability make socio-economic rights inappropriate for recognition as binding human rights.[14]

The merit of these objections and whether they still exert influence in South Africa are discussed under Section 3.2.2.9 hereof.

3.1.4 Implementation and Monitoring Implications of the Division of Rights

Reference was made earlier to Gutto's suggestion that the reading of the UDHR lends itself to "different implementation or enforcement strategies and means". Whereas I have expressed my reservation about his reading of the UDHR, I nevertheless agree with his inference with regard to the implementation or enforcement strategies for the two sets of rights.

Philip Alston writes that the ideological division within the United Nations also determined the importance that the contesting parties were to attach to each of these sets of rights. Countries with a socialist inclination tended to stress the importance of socio-economic rights and took the view that the full enjoyment of civil and political rights was contingent on the realisation of socio-economic rights.[15] The African countries, which had recently been admitted to the United Nations, also often supported the move to strengthen the commitment to socio-economic rights within the United Nations.[16]

Because of the dominance of Western Europe in the United Nations,[17] their attitude to socio-economic rights determined the importance attached to these rights by the world body. But initially this was also aided by the USSR which, in 1951, opposed any reporting system on progress made in the implementation of socio-economic rights on the basis that it was

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[13] De Villiers, *supra*, pp. 606-607.

[14] Gutto, 1992, *supra*, p. 91; De Villiers, *supra*, p. 623.

[15] Alston, 1992, *supra*, p. 485, Bokor-Szegö, *supra*, p. 22; Eide, *supra*, p. 11.

[16] O'Donovan, in Alston, 1992, *supra*, p. 119.

[17] See Alston, 1992, in Alston, *supra*, p. 195; Alston, 1998, in ESR Review, p. 2.

incompatible with the sovereignty of the state.[18] This view coincided with that of the USA which, to date, has not ratified the ICESCR, precisely on that account.[19]

The result of this attitude towards socio-economic rights by the majority of member states was that they adopted "institutional arrangements" for implementing and for monitoring socio-economic rights that were inferior to those adopted in respect of civil and political rights.[20] Whereas, for example, the rights protected by the ICCPR were required to be honoured fully and immediately, those protected by the ICESCR were to be fulfilled progressively and in accordance with resources available to the state. Declan O'Donovan discusses how the Economic and Social Council (ECOSCO) deliberately and consistently refused to take decisions that were needed in order to advance a more serious approach to socio-economic rights.[21]

3.1.5 The Vienna Declaration

The reluctance of the United Nations and its agents to take socio-economic rights seriously did not, however, dampen the resolve of those who continued their struggle within the United Nations for the equal treatment of socio-economic vis-à-vis civil and political rights. In 1963, the USSR changed its tone and argued that implementation measures should be stricter for socio-economic rights than for civil and political rights. The USSR was concerned that reluctant member states might use the standard of "progressive implementation" which applied in respect of socio-economic rights, as an excuse for doing nothing.[22]

The struggle for the two sets of rights to be placed on an equal footing paid off on 25 June 1993 when the World Conference on Human Rights adopted the Vienna Declaration. In its preamble the Declaration states that "*all* human rights derive from the dignity and worth inherent in the human person" and that "human rights … are the *birthright* of all human beings". (Emphasis added.) And then the Declaration states in Article 5:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and

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[18] Altson, 1992, *supra*, p. 485.

[19] Alston, 1998, *supra*, p. 3.

[20] Ibid.

[21] O'Donovan, *supra*, p. 115. Perhaps the saving grace for the ECOSCO is that it did not do much for civil and political rights either.

[22] Alston, 1992 *supra*, p. 486.

religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

3.2 Socio-Economic Rights in South Africa

In this section I propose to discuss the situation in South Africa with reference to socio-economic rights. I shall discuss briefly South Africa's position in relation to the ICESCR; South Africa's constitutional provisions in respect of socio-economic rights; and some court judgements on the matter.

3.2.1 The International Covenant on Economic, Social and Cultural Rights

As I have already pointed out, South Africa signed the ICESCR on 3 October 1994. South Africa has not, however, ratified the ICESCR as yet. By signing an international agreement, a country signifies that it intends to bring its laws in line with the relevant agreement. By ratifying the agreement, a country becomes a full party to the relevant agreement and must, within two years of signing it, bring its laws on which the agreement has a bearing in line with it. The country must then submit periodic reports on its performance in the area covered by the agreement. The effect is, then, that South Africa is not yet a full party to the ICESCR, but has only signified its intent to be bound by it.

3.2.2 The Constitution

The constitution of South Africa institutes socio-economic rights in respect of the following:

3.2.2.1 Slavery, Servitude and Forced Labour

No one may be subjected to slavery, servitude or forced labour. (Section 13 of the Constitution.) This right is direct, immediate and unconditional.[23]

3.2.2.2 Labour Relations

Everyone has the right to fair labour practices. Workers are guaranteed the right to form and join trade unions; to participate in the activities and programmes of their unions; and to go on strike. Employers are guaranteed the right to form and join employer organisations and to

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[23] When I use the word "unconditional" in this section, I use it in the sense that everyone is entitled to the right without regard to the resources commanded by the state and without regard to the circumstances of the specific bearer of the right.

participate in such organisations' activities and programmes. The right to collective bargaining is guaranteed. (Section 23.) These rights are direct, immediate and unconditional.

3.2.2.3 The Environment

Everyone has the right to an environment that is not harmful to his/her health or well-being. This entails the right to have the environment protected against pollution and ecological degradation. In promoting justifiable economic and social development, care must be taken to secure the ecology and to promote conservation. The first part of this right (as stated in the first sentence hereof) appears, on the face of the constitution, to be direct, immediate and unconditional. The second part of the right must be given effect to through "reasonable legislative and other measures". (Section 24.) Fulfilling the injunction of the constitution with reference to this right is not contingent upon resources available to the state, but it has to be balanced against "justifiable economic and social development".

3.2.2.4 Housing

Everyone has the right to have access to adequate housing. The state must take reasonable legislative and other measures to achieve the progressive realisation of this right within its available resources. No one may be evicted from their home or have it demolished without an order of court. (Section 26.) This is not a direct right: the bearer of the right is not guaranteed to have a house, only access to it. And then the house need only be "adequate". The right is not immediate: it allows for progressive realisation. Nor is it unconditional: it is contingent upon the state's available resources. The second part of the right imposes a negative duty on the state and on any other person to refrain from evicting a person from or demolishing their home without a court order.

3.2.2.5 Health Care, Food, Water and Social Security

Everyone has the right to have access to health care services, including reproductive health care; sufficient food; water; and social security. The state must take reasonable legislative and other measures for the progressive realisation of these rights within its available resources. No one may be refused emergency medical treatment. (Section 27.) Except for the right to emergency medical treatment, none of these rights is direct: people have only the right of access to their contents. They are not immediate, but allow for progressive realisation. And they are not unconditional: they are contingent upon the state's available resources.

3.2.2.6 Education

Everyone has the right to a basic education, including adult basic education. Everyone also has the right to further education, which the state must take reasonable measures to make progressively available and accessible. (Section 29.) The first part of the right is direct, immediate and unconditional. The second part is direct, unconditional, but not immediate: the state is allowed to bring its realisation about progressively.

3.2.2.7 Cultural, Religious and Linguistic Communities

Provided that they do not breach any provision of the Bill of Rights, persons who belong to cultural, religious and linguistic communities have the rights to enjoy their culture, practise their religion, and use their language. They may form, join, or maintain organisations associated with these rights. (Section 31, read with Section 30.) Unlike the rights discussed previously, these rights do not impose any positive duty on the state. The state is not required to do anything to bring about their realisation. The rights impose a negative duty on the state — i.e. the state must not interfere with the enjoyment of these rights.

3.2.2.8 Terminology

A number of terms used in the articulation of these rights would require a bit of unpacking. I do not attempt to do that at this stage. An attempt to unpack these terms will be undertaken in Chapter 6.

3.2.2.9 The Merits of the Objections to Socio-Economic Rights

In Section 3.1.3 hereof reference was made to the objections raised against socio-economic rights being justiciable. In this section I propose to discuss the merits of those objections.

3.2.2.9.1 Socio-Economic Rights are not Self-Executing

This objection says, basically, that the state does not have to do anything more in order to give effect to civil and political rights whereas, with reference to socio-economic rights, that is necessary. The question suggests itself: what more? Positive state action, the answer is.[24] Such positive state action would, clearly, be taken by way of legislation and provision of funds. The objection asserts, therefore, that the state does not have to do anything more for the observance of civil and political rights and that, therefore, they are self-executing. Therefore they are justiciable and socio-economic rights are not.

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[24] See De Villiers, in Van Wyk, *et al.* 1994, p. 624.

Now, in Chapter 2 I discussed the meaning of the term "human right". There is ample historical evidence that rights are proclaimed, often, precisely because they are not being observed. And the evidence is that the culprit in the non-observance of human rights that makes their proclamation necessary is often precisely the state. If human rights were self-executing, and the state did not need to do anything more for their realisation, the historical evidence suggests that we might never have all the declarations of human rights that we have had. But what we have seen is that *something more* has always been required in order to compel the observance of human rights. And, what is more, we have seen that the state itself needs to be compelled to observe human rights.

Conceptually, the notion that there are rights that are self-executing is difficult. At a conceptual level, therefore, that cannot be a reason for distinguishing socio-economic rights from civil and political rights. Civil and political rights also depended on the state doing something more for their realisation before they got established. Even now, the state still has to do something more for their observance: they are not always observed automatically.

3.2.2.9.2 Socio-Economic Rights: A Question for Politics, not Law

I propose, under this heading, to also discuss the two other objections. These are the objections that adjudication on the implementation of socio-economic rights would involve the courts in politics; and that it would blur the separation of powers.

These challenges to the justiciability of socio-economic rights must ultimately boil down to one issue — viz. that judicial intervention in the implementation of socio-economic rights is contrary to the doctrine of *trias politica*. I do not think that we should dwell too much on the other two elements since, in my view, there is not in practice an iron curtain between politics and law. Often, in practice, the law is a distillation of the political choices made by those who are in power.[25] Once those choices have been distilled into law, it is no longer up to those who made them to see to their enforcement — their enforcement depends on the executive and the judicial arms of government.

Now, the crux of this challenge is that, by adjudicating on socio-economic rights, the courts would inevitably encroach on the functional area of the executive to the extent that such judgements would have budgetary implications. This issue, in South Africa, has been resolved by the Constitutional Court's judgement in the constitution certification case, which is discussed under Section 3.2.3.2 hereof. I take the view, however, that this should never

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[25] See Tigar & Levy, 1977, p. 279; Pashukanis, 1978, pp. 3 & 96.

have been an issue, and therefore I propose to discuss it in some detail here. In order to make my point, I propose to discuss briefly the rise of mercantilism and the way in which it overcame the legal hurdles it faced.

Mercantilism surfaced between the 11th and 12th centuries. The taking of profit and interest was essential to the development of mercantilism. During this period, however, the church played a crucial political role in Western Europe, and it was obstructive of the ways of mercantilism. The church reasoned that it was dishonest to take profit or interest, since one then received more than the value of the thing or more than one had given. This created a serious problem for mercantilists, since it rendered their trade precarious. Their efforts to have laws passed that would secure agreements they had with people in terms of which they would take profit from their sales or interest on their loans, were in vain, given the political role played by the church.

The courts, however, were not averse to the notion of profit and of interest, provided only it could be disguised so that it would not be obvious that something illegal was being done. Mercantilists, therefore, employed lawyers to draw up contracts that would secure their rights. Contracts, as we know them today, surfaced during this period. In a large measure, they were designed to meet the requirements of mercantilism. According to Tigar and Levy "the writing … [of the agreement] began to take primacy over the substance".[26] The contracts were crafted in such a way that the profit or the interest was concealed. Thus, for example, if I borrowed R100 at the interest rate of 10% per annum, and I was supposed to repay the money at the end of one year, the contract would state that I have borrowed R110. And then it would state that I forswear my right to dispute receipt of the amount stipulated in the contract.[27]

Now, when a contract says one person has borrowed R110 from another, and that the borrower hereby undertakes not to place the amount stipulated in the contract in dispute, it seems quite natural that the person who reads the contract must smell a rat. It would be strange if the courts that enforced such contracts did not smell a rat — they did! However, as Tigar and Levy say, the ploy was simply to prioritise the written word over substance. Moreover, the morality that accompanied the law of contract until now, had to give way to, as Tigar and Levy call it, the "lawyer's maxim": "God keep us from the equity of parlements."[28]

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[26] Tigar & Levy, *supra*, p. 154.

[27] *Ibid*, pp. 172-173.

[28] *Ibid*, p. 151.

The net effect of this is that the right to take profit and interest could not be established through political means, for the church obstructed that. Mercantilists and lawyers established the right via the judicial process. The right is not under attack on that account. It could be argued, of course, that the *trias politica* doctrine emerged much later. One can offer two answers to that.

First, the case for the justiciability of socio-economic rights was never that the courts should legislate. It was always that the *legislature* should express socio-economic rights in laws that make it possible for them to be enforced through the courts. Then the rights would be enforced like any other right, and if court judgements in such cases had budgetary implications, in principle that would be no different from other judgements courts make with budgetary implications.

Second, courts do make law in different ways, in any event, centuries after the emergence of the *trias politica* doctrine. Justice Holmes in the United States once observed that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law".[29] Even if one takes into account the reservations raised by Paton about this view (footnote 29 hereof), the debate about the law-making powers of the courts would not just disappear.[30] Quite apart from the general debate raging out there about the law-making powers of the courts, South Africa's constitution empowers the courts in given circumstances to, in effect, make law. According to Section 8(2) of the constitution, the Bill of Rights applies vertically as well as horizontally.[31] Then Section 8(3)(a)&(b) requires that, in applying Section 8(2), the courts will check first whether there is any specific legislation dealing with the right in question. If such legislation exists, the courts should apply that legislation. If not, the courts must apply the common law or, if necessary, develop it. The courts are specifically invited by the constitution to develop rules of the common law to limit

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[29] Quoted by Paton, *supra*, p. 83. Justice Frank, also of the USA, remarked that before there is a court decision on any issue, "[the only law available is] a guess as to what a court will decide" — *ibid.* Paton believes that Holmes and Frank went a little too far in their formulation, since this has often led to the denial of the existence of any body of rules and to the view that all the law that exists is "a collection of [court] decisions". He prefers a formulation by Justice Cardozo, which is that "a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged ... is a principle or rule of law." Apart from the reservation that people like Holmes and Frank go too far in emphasising the law-making power of the courts, Paton argues that many rules of law never go to court. To say that such rules — e.g. rules of administrative law — are not law would be absurd, Paton reasons.

[30] For a detailed discussion of the issue, see Hoffmaster, 1982, pp. 21-55.

[31] It binds, in other words, the state as well as persons.

the right in question, provided only that such limitation complies with Section 36 of the constitution.[32]

Now, the constitution makes this invitation to the courts notwithstanding its clear entrenchment of the *trias politica* doctrine.[33] Even if it were accepted, therefore, that the justiciability of socio-economic rights would constitute a violation of the *trias politica* doctrine, such a violation would not have been something out of this world.

There is another way of approaching the issue. In Section 2.3 hereof I discussed, *inter alia*, Dembour and Marx's critique of the theory of natural rights. I argued, with reference to their critique, that rights are often respected without enforcement. That argument has a bearing here too. A right is not a right because the bearer is able to litigate in the face of its violation. Quite the contrary, the bearer is able to litigate in the face of a violation because he/she has a right. The right, therefore, is logically prior to the ability to litigate.

Now, if the citizen has socio-economic rights, we must assume that the executive will honour them as a rule. We must assume that failure on the part of the executive to honour such rights will be the exception and not the norm. We *do* this in respect of civil and political rights. If this is accepted, then we must also accept that litigation in order to enforce the rights will be by way of exception and that it will not be the rule. Therefore we would be entitled to expect that, in its budgeting processes, the executive will budget for the socio-economic rights as well as it budgets for *the right to counsel*, for instance.

So seen, it will remain the executive's responsibility to deal with the budgetary implications of socio-economic rights, and the judiciary will only ever get involved in the issue if a specific right is infringed — as it is the case with every other right. The argument that adjudication on socio-economic rights collapses the boundary between the executive and the judiciary is based on an incorrect premise and fails to appreciate the point being made about the justiciability of socio-economic rights. It is premised on the executive not fulfilling socio-economic rights as a norm, and therefore having to be compelled by the judiciary, as a norm, to do so. But that understanding of a right is erroneous, since the executive would not have the choice to ignore socio-economic rights if they are considered fully fledged rights.

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[32] *Section 36* requires that any such limitation be in terms of a law of general application; and that it be reasonable and justified in an open and democratic society based on human dignity, equality and freedom.

[33] *Section 43(a)* vests the legislative authority in Parliament. *Section 85(1)* vests the executive authority in the President. *Section 165(1)* vests the judicial authority in the courts.

3.2.3 Case Law

In this section I propose to discuss briefly some judgements South African courts have handed down on socio-economic rights in recent years. A number of the cases referred to here, were decided in terms of the interim constitution. Danie Brand suggests, however, that they "provide guidance on possible approaches to the interpretation of socio-economic rights in the 1996 Constitution".[34]

3.2.3.1 Education

Section 32(a) of the interim constitution provided that "[every person shall have the right] to basic education and to equal access to educational institutions". An order was sought from the Durban High Court, directing the University of Natal to admit a student to its medical faculty in terms of this section. The court decided that the term "basic education" does not include tertiary or higher education, and therefore declined the application.[35] Section 32(a) of the interim constitution, however, was held to create a positive obligation on the state to provide basic education to everyone.[36]

Section 32(c) of the interim constitution provided that "[every person shall have the right] to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race". The court was invited to determine whether the section imposed a positive obligation on the state to establish schools based on culture, language or religion, where practicable. The Constitutional Court ruled in the negative.[37]

3.2.3.2 The Justiciability of Socio-Economic Rights

Chapter 5 of the interim constitution made provision for the writing, adoption and certification of the current constitution. In order for it to assume binding force, the current constitution had to be certified by the Constitutional Court for compliance with the constitutional principles enunciated in Schedule 4 of the interim constitution.[38] When the certification process of the constitution came before the Constitutional Court, a challenge to

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[34] Brand, 1998, p. 8.

[35] *Motala and Another v University of Natal*, 1995(3) BCLR 374 (D).

[36] *In Re The School Education Bill of 1995 (Gauteng)* 1996(4) BCLR 537 (CC).

[37] *In Re The School Education Bill of 1995 (Gauteng), supra.*

[38] *Constitution of the Republic of South Africa Act*, 200/1993/71(1)(a).

its validity was made on the basis that the inclusion of justiciable socio-economic rights in its text was at variance with the said constitutional principles, and in particular Principle vi.

The principle read: "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." The essence of the challenge was that a judgement that orders the state to do something by way of honouring a socio-economic right winds down to judicial budgetary interference. Therefore it blurs the separation of powers as envisaged by constitutional Principle vi.

The Constitutional Court overruled the challenge, asserting that the judgements of the courts on a number of civil and political rights have the same effect.[39]

3.2.3.3 Housing

Section 26 of the current constitution, dealing with the right to housing, has been referred to already. The Eastern Cape had a law prohibiting certain forms of settlement.[40] Section 3B of this law allowed for the summary demolition of unauthorised buildings or structures, and did not require a court order for this. The South Eastern Cape Local Division of the High Court was invited to pronounce whether such a law could survive Section 26 of the constitution. It answered the question in the negative.[41]

In *Uitenhage Local Transitional Council v Zenza and Others*[42] an eviction order was sought against people illegally occupying land owned by the Council. Section 26(3) of the constitution requires that the court must consider "all the relevant circumstances" in deciding a case like this. Floods in this case had destroyed the houses of the illegal occupiers and they had no alternative dwellings. It also transpired, however, that they had been "recalcitrant" in their dealings with the Council. The court decided that their recalcitrance, coupled with the fact that the land in question was needed in order to build houses for 8 000 people, outweighed the circumstances in their favour. Therefore the court authorised their eviction.

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39 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC).

40 *Prevention of Illegal Squatting Act*, 52/1951.

41 *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd* 1997 (8) BCLR 1023 (SE).

42 1997(8) BCLR 1115 (SE).

3.2.3.4 Health

The two leading cases in this regard are *B and Others v The Minister of Correctional Services and Others*[43] and *Soobramoney v Minister of Health, KwaZulu-Natal.*[44]

In the first case the applicants were prisoners. They were HIV-positive and approached the Cape High Court for an order directing the Department of Correctional Services to supply them with AZT. They relied on Section 35(2)(e) of the constitution, which reads:

> Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

The court entered an order in favour of the applicants. It stated that, once it is established that any medication other AZT would be inadequate for the task at hand, it is no defence on the part of the state to say it does not have the money to supply the drug.

The second case went to the Constitutional Court by way of an appeal against a judgement of the Durban and Coastal Local Division of the High Court. Thiagraj Soobramoney, the applicant, suffered from diabetes, an ischaemic heart disease and had an irreversible chronic renal failure. He suffered a stroke as a result of cerebro-vascular disease. The only treatment that could keep him alive was haemodialysis, and it was available at the renal unit of the Addington Hospital, Durban. Apart from Grey's Hospital in Pietermaritzburg, whose renal unit is very small, no other hospital in KwaZulu-Natal had dialysis machines.

The Addington Hospital had developed criteria for admitting patients to its dialysis treatment. *Inter alia*, the criteria stipulated that the patient must be eligible for a kidney transplant. Since Soobramoney had other ailments, which prevented him from recovery, he did not meet the hospital's criteria. Therefore he was refused admission to the hospital's renal clinic. Soobramoney did not have money to pay private clinics for the treatment. Neither did his relatives. He was on the verge of dying and approached the court — his prayer, as lawyers are wont to say, being that the court should direct the hospital and the Department of Health to admit him to the clinic at the expense of the state. He relied on Section 27(3) of the constitution, which reads: "No one may be refused emergency medical treatment." His counsel told the court, amongst other things, that Soobramoney had a life expectancy of another 15 to 20 years if he received regular dialysis.

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[43] 1997(6) BCLR 789 (C).

[44] 1997(4) BCLR 1696 (CC).

In argument, the court put it to his counsel per Justice Albie Sachs that Soobramoney was competing for state resources with people dying from AIDS and TB and with children dying from lack of simple nutritional support. Aren't all these factors the court must attach weight to? Counsel for Soobramoney agreed, but reminded the Constitutional Court that he was also competing for state resources with people who are receiving benefits for non-life-threatening problems. The Constitutional Court ruled against him. The court reasoned that a chronic disease does not constitute an emergency within the meaning of the Bill of Rights even if it is life threatening. What was envisaged with the phrase "emergency medical treatment", the court opined, was something in the order of a sudden catastrophe, calling for immediate medical attention so as to avoid harm. The court, moreover, was satisfied that the hospital authorities had applied their mind properly on the criteria for admission to the clinic, and that it was not its place to interfere with the hospital's "rational decision". Soobramoney died shortly afterwards.

3.3 Socio-Economic Rights: The Stepsister of Civil and Political Rights?

Alston writes that socio-economic rights have been "the poor and neglected cousins of civil and political rights" for many years.[45] Should they have been?

In Chapter 2 I have argued that human rights are an expression of basic human needs, and that these needs are natural.[46] I have argued that civil and political rights, although their naturalness is not immediately obvious, are also an expression of basic human needs. In my view the connection between nature and socio-economic rights is much more obvious than the connection between nature and civil and political rights. It is odd, therefore, that so much effort had to be laid out in justifying socio-economic rights whereas civil and political rights were embraced more readily. Upon serious reflection it becomes clear that calling the status of civil and political rights into question would in fact have had more conceptual integrity than calling the status of socio-economic rights into question.

In Chapter 2 and in this chapter I have referred to suggestions that, in the end, the full enjoyment of civil and political rights is in fact contingent upon the enjoyment of socio-economic rights. Denial of the right to health care, for instance, impacts directly and

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[45] Alston, 1998, *supra*, p. 4.

[46] I am not concerned here with the question whether there is something like human nature or not, in the manner debated by Andrew Collier — c.f. *Scientific Socialism and the Question of Socialist Values* in Mepham & Ruben (eds), 1981, pp. 5-13. I am concerned only with the view posited in Chapter 2 that normal people want to do or have the things signified by the statements expressing human rights.

fundamentally on the right to life. When the United Nations General Assembly initially debated the ICESCR in 1950, the "socialist" states argued for the inclusion in the Covenant of an article on the right to work. They argued that the right to work is the cornerstone of modern society and that it is foundational to many other rights, notably the right to life.[47] It has also been suggested that without shelter, food and education, not only is the right to life precarious, but that human dignity vanishes instantly. Karl Marx understood this only too well when he wrote:

> The premises from which we begin are not arbitrary ones, not dogmas, but real premises from which abstractions can only be made in the imagination. They are the real individuals, their activity and the real material conditions under which they live, both those which they find already existing and those produced by their activity.... The first premise of all human history is ... the existence of living human individuals. [The first historical act of these individuals distinguishing them from animals is not that they think, but that they *produce their means of subsistence.*][48]

It was only after people had overcome these subsistence problems, Ernest Mandel writes, that it was possible to free some from productive labour and assign specialised, though non-productive, duties to them. These included, indeed, governing others, which throws up the discourse on human rights as we know it today. Writes Mandel:

> The birth of the state is therefore the product of a double transformation: the appearance of a permanent social surplus product, relieving a part of the society from the obligation to work in order to ensure its subsistence, and thus creating the *material conditions* for this part of society to specialise in the accumulative and administrative functions; and a social and political transformation permitting the exclusion of the rest of the community from the exercise of the political functions which had hitherto been everyone's concern.[49]

These views, it is important to state, were also well taken by Franklin Roosevelt as evidenced by his Four Freedoms Speech. In any event, the Vienna Declaration just about seals the debate on the status of socio-economic rights. Alston writes:

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[47] Craven, 1995, p. 195.

[48] Marx, 1984, in Marx/Engels/Lenin, p. 17.

[49] Mandel, 1979, p. 27.

> A key principle of international human rights law is that all human rights — civil and political, as well as economic, social and cultural rights — are closely interrelated and of equal status. Practical experience has shown that it is erroneous to assume that if one set of rights is implemented, the other will follow automatically.[50]

The case law referred to in South Africa also seals the question whether socio-economic rights are justiciable or not — they are. Bertus de Villiers writes:

> [T]here is general agreement in South Africa that the state, acting on its own and in partnership with the private sector, has a responsibility in fields such as housing, welfare, education and employment. The disputed question is whether the state could and should be placed under a legal obligation in terms of a Bill of Rights to undertake certain actions and develop assistance programmes or if it is purely a matter for legislative and political discretion to develop such programmes.[51]

It is only necessary to add that, after De Villiers had written about the disputed question referred to in the foregoing passage, the constitution indeed placed the state under a legal obligation to undertake such actions. And the Constitutional Court ruled that that is as it should be. Therefore, in my view, it is not valid/legitimate, and it never was, to view socio-economic rights as a stepsister to civil and political rights.

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[50] Alston, 1992, *supra*, p. 2.

[51] De Villiers, in Van Wyk et al., 1994, p. 621.

Chapter 4
Monitoring Socio-Economic Rights: Some Methodological Issues

4.1 Background

South Africa has a constitutionally sanctioned system of monitoring the implementation of socio-economic rights. First, the constitution calls into existence a Human Rights Commission.[1] And then it gives the Commission the power to call upon organs of state annually to provide it with information regarding the measures they have taken towards the realisation of the rights to housing, health care, food, water, social security, education and the environment.[2] On the basis of such information, the Commission compiles a report for parliament on progress the country is making in the realisation of socio-economic rights.

In this chapter I undertake to inquire into the method(s) used by the SAHRC to collect its data and whether, therefore, the inquiry was methodologically so geared that it could yield reliable information. The data were gathered by:

- The SAHRC from government departments and other organs of state in 1998;
- The Community Agency for Social Enquiry (CASE) on behalf of the SAHRC in the same period; and
- The South African Non-Governmental Organisations Coalition (SANGOCO).

4.2 Data Collection of the South African Human Rights Commission

The SAHRC sent out questions to government departments and other relevant organs of state as these are defined in Section 239 of the constitution.[3] These questions were contained in documents called "Protocols for Requesting Information". CASE conducted a nationwide survey on public perceptions regarding government's delivery on socio-economic rights. In partnership with SANGOCO and the Commission on Gender Equality (CGE), the SAHRC conducted countrywide public hearings on poverty.

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1 *Section 181(1)(b).*

2 *Section 184(3).*

3 *Section 239* of the constitution defines an "organ of state" as a government department, or any functionary or institution exercising power or performing a function in terms of the national or provincial constitution. An institution exercising a public power or performing a public function in terms of a statute is also an organ of state, but this does not include the courts.

4.2.1 The Protocols

In essence the protocols are international reporting instruments on human rights. They were adapted in order to take cognisance of the specific legal formulations on socio-economic rights in the South African constitution. In total, there were seven protocols covering the right to the following: housing, health care, food, water, social security, education and environment. On average each protocol was about 14 pages long. In view of the fiscal implications of socio-economic rights, a special protocol was developed for the Department of Finance. Considering the centrality of land to the realisation of socio-economic rights, a special protocol was also developed for the Department of Land Affairs.[4] The table below shows the departments or organs of state to which the protocols were sent.

Table 1: Departments or Organs of State to which Protocols were sent

Protocol	Department/organ of state
Housing	National Department of Housing; National Department of Correctional Services; provincial and local governments
Health care	National Department of Health; provincial and local governments
Food	National Department of Agriculture; provincial and local governments
Water	National Department of Water Affairs & Forestry; provincial and local governments
Social security	National Department of Welfare; provincial and local governments
Education	National Department of Education; National Department of Correctional Services; provincial and local governments
Environment	National Department of Environmental Affairs & Tourism; provincial and local governments
Finance	National Department of Finance
Land	National Department of Land Affairs; provincial and local governments

Source: SAHRC, *Economic & Social Rights Report*, Vol. 1, 1997-1998

National, provincial and local spheres of government did not receive identical protocols, since their competencies are not the same in respect of the rights under consideration. The departments or organs of state were requested to complete the protocols and return them to the SAHRC for evaluation. They were asked:

- To describe their systems of gathering the information and of monitoring the implementation of socio-economic rights;

[4] SAHRC, 1998, Vol. I, p. 16.

- To list the legislation, policies and other measures they have introduced in order to bring about the realisation of socio-economic rights; and
- To provide their own interpretation of their obligations, emanating from the constitution, on the realisation of socio-economic rights.[5]

In order to facilitate the answering of the questions and uniformity, departments and state organs were provided with guidelines on how to answer the protocols.[6] The data relating to the protocols were gathered between December 1997 and February 1998.[7]

All ten national departments to which the protocols were sent returned them completed. Out of the nine provincial governments to which the protocols were sent, five returned them completed whilst the remaining four did not respond. It is not clear how many local governments the protocols were sent to. Nor is it clear how many responded. On the face of the report it seems only the Greater Johannesburg Metropolitan Council responded. It is also clear from the SAHRC's displeasure that there was a poor response rate from local government.[8]

4.2.2 Public Perceptions: The CASE Survey

CASE conducted a survey into public perceptions on the realisation of socio-economic rights in South Africa. The survey took place between February and March 1998, and was conducted in all nine provinces. There is no indication in the report as to the sample size of the survey, but on the face of the questionnaire it seems that at least 1 200 people were interviewed.

The questionnaire was administered personally, and "in the language most commonly spoken by the interviewees".[9] However there is no indication in the report as to who administered the questionnaire; what training they had; what measures were taken to ensure that questions asked in different languages remained essentially the same; or what levels of proficiency the interviewers had in the various languages the questionnaire was administered in.

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5 SAHRC, 1998, VI, p. 5.

6 SAHRC, 1998, Vol. I, p. 15. See also SAHRC, Vol. VI, p. 5. The guidelines themselves are by way of an "explanatory memorandum", an example of which is published in SAHRC, 1998, Vol. II, pp. 1-4. The guidelines explain the legal basis of the inquiry; terms that are used in the protocols; and indicate the documents departments or organs of state should attach to the protocols.

7 SAHRC, 1998, Vol. I, p. 19.

8 SAHRC, 1998, Vol. I, pp. 20-21.

9 SAHRC, 1998, Vol. VI, p. 6.

The CASE survey was aimed at "[enriching] the Commission's understanding by providing a sample of the views and perceptions of the public and some non-governmental organisations".[10] It was also aimed at "[shedding] light on the nature and reach of government policies, seen from the point of view of their intended beneficiaries".[11] The survey tested public perceptions on:

- Human rights broadly;
- The general living conditions of people in South Africa;
- New development projects;
- The environment; and
- Housing, health, food, water, social security and education.

CASE also conducted interviews and held meetings with a number of NGOs and human rights activists with a view to supplementing the quantitative data emanating from the survey.[12]

4.2.3 Public Perceptions: The SANGOCO Poverty Hearings

The SAHRC, in partnership with SANGOCO and the CGE, held public hearings on poverty. These hearings, convened under the title "National Speak Out on Poverty", occurred between March and June 1998.[13] Although the report has a methodology section,[14] there is no description in that section of how these hearings were conducted. It is, however, possible to glean the methodology of the hearings in an unrelated section in the report. In total, ten hearings were held throughout the country. Seven of the hearings focused on a single social and economic right, whereas the remaining three hearings were non-thematic. Approximately 10 000 people participated in the hearings, of whom 600 made oral submissions. The rest either made written submissions or participated simply by attending the hearings or mobilising others to attend.[15]

One can observe in parenthesis that sufficient care was not taken in some of the formulations in the report. The statement, for instance, that seven hearings focused on a

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[10] SAHRC, 1998, Vol. I, p. 16.

[11] SAHRC, 1998, Vol. VI, p. 6.

[12] SAHRC, 1998, Vol. VI, p. 6.

[13] SAHRC, 1998, Vol. I, p. 17.

[14] SAHRC, 1998, Vol. V, p. 3.

[15] SAHRC, 1998, Vol. V, p. 1.

single right, is ambiguous. It could convey the sense that all seven hearings focused on the same right. But it could also signify that each one of the seven hearings focused on a different right. I suggest that a contextual reading of the report would support the second possibility, the context being that there are seven rights at issue, and therefore it would make sense to see every hearing as a kind of focus group, each dealing with another right. In the light of the context in which these hearings took place, the first interpretation would invite a little bit of justification. Had all seven hearings, for instance, focused on one right only, one might expect the relevant right to be named, and that there would be some explanation why seven hearings would be held on a single right.

The aim of the public hearings was to "listen to the experiences and opportunities of the poor".[16] The hearings also aimed at gathering information from poor people themselves on what economic and social rights mean for them, and what obstacles and difficulties they had in gaining access to these rights.[17]

4.3 Methodological Issues

In this section I propose to investigate some of the methodological strengths and weaknesses of the SAHRC's inquiry into the implementation of socio-economic rights. In part, the investigation will be whether the methodology employed can and does lead to answers to the questions that the SAHRC's study raises for itself. And then the inquiry must also consider whether such answers as the SAHRC's study yields are reliable, given the way in which they are arrived at.

I must emphasise that at this stage I am not concerned with the findings of the SAHRC's study — those will be the subject matter of Chapter 5. The concern here is whether the findings, whatever they are, were arrived at in a methodologically sound manner. In other words, whether the findings, whatever they are, are scientific. That is not to say the scientific method is the only route to truth. Every now and then people are known to stumble upon truths quite per adventure.[18] But where people deliberately set out to study a phenomenon, the study has to conform to set standards and the purpose of this section is to test the SAHRC's study for compliance with those standards. The standards I shall test the SAHRC study's methodology against are objectivity, representativeness and reliability. However, it is necessary to inquire into the nature of the SAHRC's study first, and satisfy ourselves that it

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[16] SAHRC, 1998, Vol. V, pp. 1 and 3.

[17] SAHRC, 1998, Vol. V, p. 3.

[18] Martin, 1997, *supra*, p. 14.

was indeed a research project, before subjecting it to standards that might otherwise be foreign to it.

4.3.1 The Nature of the Study

A major problem we face in respect of the nature of the study is that the SAHRC's inquiry is a hybrid study. It is at once a legal inquiry and a research project properly so called. The CASE survey and the interviews that were conducted to supplement its quantitative data constitute research, properly so called. There can arise no question about the propriety of imposing the research standards referred to earlier on this aspect of the inquiry.

The protocols process constitutes a legal inquiry. The protocols, as pointed out previously, are in essence reporting instruments of international law.[19] But quite apart from that, the SAHRC's study is a legal inquiry also in the sense that it is based on the injunctions of the constitution. The registration by the SAHRC of its displeasure at some government structures failing to return the protocols, seals the legal nature of the inquiry:

> This unconstitutional conduct on the part of some national, provincial and local government structures is unacceptable and will not be tolerated ... in the future. Governmental departments should be aware that they have a legal obligation in terms of the Human Rights Commission Act ...[20]

Although that is so, the SAHRC approached the protocols process on the basis that it was research. In the preparatory phase, the SAHRC held a series of seminars and workshops in order to thrash out a number of issues that would impact on the inquiry. The chairperson of the SAHRC, Barney Pityana, was clear that the exercise had to be informed by the international experiences on the monitoring of socio-economic rights; that it had to be theoretically embedded; and that it had to be methodologically sound.[21] Further, the SAHRC analysed the data that it gathered on the basis that the data were research data.[22]

Although, therefore, the legal aspect of the inquiry does not lend itself too easily to the kind of analysis researchers are accustomed to, the understanding of the SAHRC of the task it undertook constitutes an open invitation to bring established research standards to bear on it. Therefore whilst we can expect to find no explicit hypothesis formulation and/or testing in

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[19] See Bayat, Bekker & Heyns, 1997, in Liebenberg (ed.), pp. 9-10.

[20] SAHRC, 1998, Vol. I, p. 21.

[21] Letter dated 10 September 1997 to partners in the inquiry and "Concluding Address" in Liebenberg, *supra*, p. 35.

[22] SAHRC, 1998, Vol. III, p. 149.

the legal aspect of the work, this being foreign to legal thinking, we would still be entitled to inquire into the theoretical embeddedness of the study. We would still be entitled to inquire into the study's internal logical consistency.

4.3.2 Objectivity

Generally a study is considered to be objective if it is as free as possible of the influence of the specific researcher who conducted it.[23] Mouton suggests that, to be objective, a study must satisfy four criteria, namely, *theoretical validity*, *measurement validity*, *reliability* and *inferential validity*.[24]

4.3.2.1 Theoretical Validity

Theoretical validity requires that the theory or interpretation informing the study must be logically consistent, enjoy wide applicability, and have explanatory and predictive potential. In applying the test of theoretical validity to the SAHRC's study, we must therefore inquire into the conceptualisation of the study; the theoretical framework that undergirded it; and the degree of literature support the study's hypothesis enjoys.[25]

4.3.2.1.1 The Protocols

Sandy Liebenberg outlines the theoretical framework within which the protocols process occurred.[26] Unfortunately this framework does not at all go beyond the constitution. As Liebenberg says herself, "[the] framework for identifying violations is derived from the constitutional duty of the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'".[27] Barring the occasional reference to clauses of the constitution, the paper is bereft of any reference to any literature whatsoever.

We must conclude that the protocols process was conceptualised around the constitution. It is not, therefore, embedded in the vast literature that is available on socio-economic rights. For that reason we cannot say that the SAHRC's inquiry was undergirded by a theoretical framework that enjoys wide application or that it has explanatory or predictive potential. This deficiency affects the SAHRC's analysis of the data it works with, a

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[23] Mouton, 1996, *supra*, pp. 112-113; McNeill, 1985, p. 5; Maykut & Morehouse, 1994, pp. 19-21; Martin, 1997, p. 324.

[24] Mouton, *supra*, in Wallace & Wolf, 1980, pp. 53-54.

[25] Mouton, 1996, p. 110.

[26] Liebenberg, in Liebenberg, *supra*.

[27] Liebenberg, *supra*, p. 14.

matter we shall return to in Chapter 5. For now, suffice it to say that in the analysis of its data the SAHRC makes no effort, for instance, to reconcile assertions that are clearly contradictory. It makes no effort to establish any articulation between the results of the different data-gathering processes it followed, a matter discussed in greater detail under Section 4.3.2.3 4 hereof.

Having said that, however, it can be stated that the SAHRC went to great lengths to ensure that the protocols are consistent with the relevant sections of the constitution in respect of which they sought information. Therefore there is logical consistency between the protocols and their relevant constitutional bases.

4.3.2.1.2 The CASE Survey

Like the protocols study, the CASE survey was conceptualised around the constitution. It has no explicit hypothesis formulation and/or testing. In discussing their findings, however, CASE makes reference to relevant literature. The study's limitation in this regard is that it refers to single sources in respect of any matter that it references. We therefore do not get a fuller spectrum of the literature on any of the issues in respect of which it cites sources. Consequently we do not know whether there are competing views or not on the issues it covers. Nevertheless it remains possible to say that this section of the SAHRC's inquiry is more embedded in the literature and therefore enjoys more theoretical validity than the protocols study.

The CASE part of the study, moreover, has explanatory as well as predictive potential precisely because it is, albeit in a limited sense, embedded in the literature on the subject it deals with. When, for instance, CASE tells us that "provincial government does not feature in people's minds as an important actor in service delivery" there is an explanation for that phenomenon. We are told that it is probably because no distinction is drawn between the provincial government's work and the work of national government. (We do not know from the study who is the agent(s) not drawing this distinction, but there is at least an explanation.) And support for that explanation is found in previous studies that have been conducted on the matter.[28] (So, if it is crucial to know who is failing to make this distinction we can hopefully refer to the literature available on the issue.) Armed with such information, we can now predict that if the failure to distinguish between the work of the provincial government and

[28] SAHRC, 1998, Vol. VI, p. 23.

that of national government persists, provincial government will become irrelevant to the needs of the people.

4.3.2.1.3 The Poverty Hearings

It is not clear at all how the poverty hearings were conceptualised. The only thing we know about the reason for holding them is that it was felt necessary to "listen to the experiences and opportunities of the poor", although to what end, we are not told. I would suggest that we see these poverty hearings as some kind of focus groups, given the manner in which they were conducted. If the protocols process was thin on theoretical embeddedness, the poverty hearings are even thinner.

4.3.2.2 Measurement Validity

Measurement validity requires that the measurement instrument the study uses must be able to do what it is supposed to do. It must be stable and consistent over time and in different contexts. In this section I propose to examine the research instruments used in the SAHRC study for compliance with the standard of measurement validity.

4.3.2.2.1 The Protocols

Insofar as the protocols were structured in the language of the constitution, they should have been able to measure progress made in steps introduced for the realisation of socio-economic rights. The protocols were adapted to fit in with the requirements of different departments. Abstractly viewed, it is possible to say that they were therefore not kept constant under different circumstances. But to have kept them constant in that sense would have defeated the purpose not only of the inquiry itself, but of the notion of consistency too, since it would have rendered the protocols inapplicable in most departments and state organs.

The departments were asked, moreover, to describe the effects of past policies, legislation and practices they were dealing with in their socio-economic endeavours.[29] Therefore it should have been possible to draw historical comparisons in inquiring into the progress made. As such there should have been no confusion about what the situation was at the time when the measures, whatever they are, were introduced. In other words, it would have been possible to analyse the situation being dealt with independently of what the situation was before the measures were instituted, and therefore to measure the progress made.

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[29] SAHRC, 1998, Vol. I, p. 16.

The researcher is arguably the most important research instrument in this kind of qualitative study. In scrutinising the ability of the research instrument to measure what it is meant to measure, the researcher also needs to be factored in. Therefore it is customary, in writing a research report, to state clearly who the researcher was and what training he/she had. If interviewers were used to administer a questionnaire, it is customary to state clearly who they are, and what training they have received. I indicated earlier that the protocols were sent to the departments and other organs of the state for completing. The report does not state who filled in the protocols and what training they had. Nor does it deal with the possible threats to the validity of the information yielded by the protocols process as a result of "interviewer effects", or what was done to control for such threats.[30]

From the standpoint of the protocols as a research instrument, therefore, it seems that the study had measurement validity. The same can however not be said in respect of the actual process of completing the protocols.

4.3.2.2.2 The CASE Survey

The research instrument used in the CASE survey was a questionnaire, and it sought to establish perceptions of the public on the content of the seven socio-economic rights listed in Section 184(3) of the constitution (listed under Section 4.2.1 hereof). It also sought to establish perceptions of the public on whether government was delivering in terms of the said rights. The questions asked were clear and should therefore occasion no difficulty in yielding appropriate data in terms of what the study sought to understand. The questionnaire had clear instructions for the interviewers and it should therefore have been possible to avoid any unnecessary variations in the administration of the questionnaire by the interviewers.

However the problem I have raised about the researcher or the interviewer being a research instrument (Section 4.3.2.2.1 hereof), applies here too. It is a deficiency of the study that it does not tell us who the interviewers were and what kind of training they received before being sent to the field. A further difficulty in this respect relates to the failure to indicate what measures were instituted in order to ensure that questions asked in different languages remained essentially the same (see Section 4.2.2 hereof). These deficiencies undermine the measurement validity of the research instrument and could seriously compromise the reliability of the data.

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[30] See Mouton, 1996, *supra*, pp. 148-150.

4.3.2.2.3 The Poverty Hearings

On the face of the report, no questionnaire or interviewing schedule was used for these hearings. Therefore it is not possible to assess whether the research instrument in that sense would satisfy the test for measurement validity. Apart from being told that the poverty hearings were held at the behest of the SAHRC, CGE and SANGOCO, we do not know who conducted these hearings and what training they had.

From the standpoint of the reliability of the research instrument it is therefore not possible to assess the public hearings.

4.3.2.3 Reliability

The test for reliability demands that the data collected as evidence, and the data collection process, must be reliable. That requires, in turn, that the sources of the data must be authentic, representative and accurate, and that the process of gathering the data must warrant this.

4.3.2.3.1 The Protocols

I have pointed out under Section 4.2.1 hereof that all ten government departments to which the protocols had been sent, returned them completed. Out of nine provincial governments to which the protocols were sent, five returned them completed. On the national and the provincial levels the response rate was high and the data gathered through the protocols process are therefore representative in the sense that it would be possible to generalise from them. On the local level the response rate was very poor and the data cannot be seen to be representative in that sphere of government.

However other factors have to be taken into account before we can accept the data gathered in the national and provincial spheres without any reservation. The remarks made under Section 4.3.2.2.1 hereof have a bearing on this question. Therefore all the data collected by the protocols process are reliable to the extent that the process itself was reliable. To the extent, then, that the protocols were designed in strict compliance with the constitutional stipulations on the rights in question, they should be able to yield the information required by the constitution. In other words, the correct questions were asked for the purpose of securing the facts that the constitution says must be secured.

With regard to the filling in of the protocols, however, I think that the reliability of the data can be challenged on two fronts. First, as I have already pointed out, the validity of the study can be challenged on the basis that we do not know enough about the people who completed the protocols insofar as they were a research instrument. We do not know enough

about the measures taken by the SAHRC to control for errors that may have arisen as a result of who completed the protocols.

Second, the study can be challenged on the basis that the people who completed the protocols were also the source of the information they reported on.[31] The question must therefore arise whether, and to what extent, the research instrument (i.e. the government official who completed the protocols) was able to detach itself from the phenomenon it was collecting and supplying information on.[32] Quite apart from the ethical questions that must be asked about the source of the data also being the research instrument, the risk for bias is great. The report does not deal with this and so once again we do not know if the SAHRC has controlled for errors which might arise as a result of this.

We must conclude therefore, it seems to me, that an "unscientific" process of gathering the data in this regard does not and cannot warrant the authenticity and accuracy of the data. This does not necessarily mean that the data are therefore inauthentic and inaccurate. It is possible, as I have suggested previously, that an unscientific process may yet lead to a statement that is, objectively viewed, true. But then, as I have also suggested, there is no point in undertaking a study if we can only hope to arrive at correct conclusions by fluke.

4.3.2.3.2 The CASE Survey

We may have expected that CASE would disclose in their report not only how many people were interviewed, but also how their sampling was done.[33] (I am aware of the fact that I have made reference to the statement in their questionnaire to the effect that at least 1 200 people would be interviewed. I do not think that it therefore follows that 1 200 were interviewed. And in any case their questionnaire is not attached to their report and therefore cannot form a part of one's reading of that report.)

Sampling is so central to survey research, it would not be an exaggeration to say that if one's sampling is not sound, the entire study is tainted. The reason for this is that research logic is essentially inductive.[34] Because we proceed from the particular to the general, it is essential that the particular that we proceed from is representative of the general. As Mouton says, "Unless the sample from which we will generalise 'truthfully' represents the population

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[31] SAHRC, 1998, Vol. I, p. 15.

[32] About the importance of researcher detachment from the phenomenon or event being studied, see Mouton, 1996, *op cit*, pp. 150-152; McNeill, *supra*, pp. 70-71; Hammersley & Atkinson, 1996, p. 110.

[33] See Mouton, 1996, *supra*, pp. 175-176; McNeill, *supra*, pp. 125 & 128.

[34] Mouton, 1996, *supra*, p. 71; Martin, *supra*, p. 76; Strauss & Corbin, *supra*, p. 148.

from which it is drawn, we have no reason to believe that the population has the same properties as those of the sample".[35]

The failure by CASE to disclose information relating to sampling makes it impossible to assess the merits of the study.[36]

4.3.2.3.3 The Poverty Hearings

We do not know who participated in the poverty hearings or what qualified them to speak on behalf of the poor on the issues under consideration. Neither do we know how they were selected. We know that out of 10 000 people who "participated" in these hearings, 600 made oral submissions. An undisclosed number made written submissions and another number "participated" merely by being present at the hearings or by mobilising others to attend. We do not know what qualified those who mobilised others to do so, or what methods or tactics of mobilisation they used. Neither do we know the criteria they used for selecting people to be mobilised. Therefore we must conclude, it seems to me, that this part of the study, if indeed such it may be called, is impossible to evaluate on the yardstick of reliability.

Once again, this is not to say that the things that were said at these hearings are false — many of them may be true — but only that, if it is a part of a systematic study, one is entitled to expect it to be conducted in a manner that inspires confidence in its findings.

4.3.2.3.4 Triangulation

I have suggested while discussing the reliability of the data, that the critique I make does not necessarily mean that the data are false — only that, for the reasons mentioned, they are unreliable. The data could be rendered more reliable if confirmed by other reliable means. Now, the SAHRC employed different methodologies in order to inquire into the implementation of socio-economic rights in South Africa. The reasoning behind the employment of more than one methodology can be gleaned from the report:

> The state protocols have been administered, collected and analysed. In addition, following a suggestion made by CASE, the SAHRC decided to embark on another and more innovative process. This consisted of going to the grassroots to ask ordinary citizens if and how their lives have been affected by the work of government at national, provincial and local levels. CASE has taken charge of

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[35] Mouton, 1996, *supra*, p. 136.

[36] McNeill, *supra*, p. 125.

> this aspect of the research, by conducting a national survey of the population and reporting on their responses, perceptions and views .... *Grand policy proclamations, Green and White Papers, Bills and Acts of Parliament, can thus be measured through the prism of their real effects, rather than their intended effects*.[37] (Emphasis added.)

Therefore, quite clearly, the intention with employing different methodologies was to obtain a balanced picture. Consequently, one is entitled to expect that there would be an effort to reconcile the data gathered through the protocols method with the data gathered through the CASE survey and the poverty hearings. Further, CASE itself went a step ahead and, in addition to the survey, conducted interviews and held meetings with "a wide range of NGO's and activists who work with disadvantaged communities on various socio-economic issues". The point of these interviews and meetings was "to supplement the quantitative information" emanating from the survey.[38]

Unfortunately the report makes no effort to reconcile the data it received from its different research activities. It makes no effort to confirm one data set against the other, and it thus misses a golden opportunity to place its data on a safer footing. We are left, instead, with a disclaimer by CASE:

> The report is not an evaluation of government performance, or a comprehensive study of the state of socio-economic service delivery in South Africa. Rather it is a study that draws attention to the *views and perceptions* of people on the ground. Our brief focused on capturing the views of the public and NGO's, rather than on evaluating government claims against empirical evidence of delivery. It is the task of the SAHRC to reconcile official and non-official versions, and offer an overall view of the state of realisation of socio-economic rights.[39]

Therefore lack triangulation of methodologies and of researchers leaves the SAHRC study as unreliable as it was before.

4.3.2.4 Inferential Validity

Inferential validity requires that the evidence must support the conclusions the study arrives at. I shall deal with the conclusions drawn by the study from the materials it received in

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[37] SAHRC, 1998, Vol. VI, pp. 5-6.

[38] SAHRC, 1998, Vol. VI, p. 6.

[39] SAHRC, 1998, Vol. VI, pp. ii and 6.

Chapter 5. I propose, therefore, to defer discussion on whether the evidence gathered supports the conclusions drawn until I have dealt with the Commission's conclusions.

4.3.3 Representativeness

The question of representativeness with reference to the SAHRC study has already been touched on. I have indicated that the data gathered through the protocols process are representative of the national and the provincial spheres of government and that they are not representative of the local sphere. (See Section 4.3.2.3.1 hereof.)

With reference to the poverty hearings, although the report indicates that some 10 000 people participated in it, I do not think that the question of representativeness is germane. I have suggested that the poverty hearings be seen as some kind of focus groups. It is not expected of focus groups that they should be statistically representative.[40] It is, however, a requirement of focused interviews that the interviewee must be representative in the sense that he/she is knowledgeable in the research subject.[41] I have indicated (Section 4.3.2.3.3 hereof) that we do not know who the interviewees were for the poverty hearings or how they were selected. Therefore it is not possible to assess their representativeness.

The CASE survey, as I indicated, hopefully interviewed at least 1 200 people, but we do not know anything about the survey's sampling method. True, we know that some people lived in urban areas and others in rural areas; that some were men and others were women; that some were white and others were black; and that some lived in formal and others lived in informal settlements. But that is not much to go by, since in every one of these settings there must be variations. Therefore not much can be said by way of evaluating the representativeness of the interviewees.

4.4 Conclusion

Although the SAHRC study has methodological weaknesses, it has, as I have indicated, strengths. However I think that the weaknesses are far too numerous and, I may add, totally unnecessary. In Chapter 3 I have discussed the challenges generally facing the project on socio-economic rights. Philip Alston shows that the United Nations does not take socio-economic rights as seriously as it should.[42] He suggests that the normative content of socio-

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[40] See Rubin & Rubin, 1995, p. 5.

[41] *Ibid*, pp. 83-85.

[42] Alston, 1992, *supra*, p. 485.

economic rights is far from clear and that the reports of states are crucial to the clarification of the normative content of these rights.[43]

In view of the numerous challenges still facing socio-economic rights, and the fact that reports like the one under review play a crucial role in clarifying the normative content of socio-economic rights on a world scale, one might have thought that the SAHRC study on socio-economic rights undertaken by people who champion those rights would have been methodologically robust so as to place its findings beyond question.

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[43] *Ibid*, p. 491.

Chapter 5
Implementation of Socio-Economic Rights in South Africa — A Critique

5.1 Background

Christof Heyns of the Human Rights Centre, University of Pretoria, analysed and evaluated the data gathered from government on behalf of the SAHRC. The Centre for Applied Legal Studies (Wits University) and the Community Law Centre (University of the Western Cape) assisted him. In analysing and evaluating the data, government responses were measured against the protocols requesting the data, as well as guidelines, norms and standards emanating from international instruments.[1]

In this chapter I shall discuss the evaluation of the data by the SAHRC. In doing so, I shall also attempt to unpack some of the terms that I alluded to in Section 3.2.2.8 hereof. And then I shall attempt a critique of the SAHRC's evaluation of the data it was working with.

5.2 The SAHRC's Analysis and Evaluation of the Data

The analysis and evaluation of the data are fashioned after the protocols that were used to request the information. Therefore government's responses are analysed and evaluated separately in respect of each of the seven socio-economic rights. The SAHRC inquires into government's understanding of its obligation under the specific right; pronounces on the correctness of such understanding; and then inquires into the things government has done in response to the injunction of the right. The injunction of every right conveys different expectations in the sense that government is variously required to respect, protect, promote and fulfil the specific right.[2] Consequently the SAHRC's analysis and evaluation of the data inquire into government's understanding of its obligations in respect of these different expectations too.

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[1] SAHRC, 1998, Vol. IV, p. 1. The international agreements referred to are the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*; the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*; and general comments of the Committee on Economic, Social and Cultural Rights.

[2] *Section 7(2)* of the constitution.

5.2.1 Housing

Housing is discussed under the three spheres of government — i.e. national, provincial and municipal. At national level, the departments that receive consideration are the Department of Housing and the Department of Correctional Services. The provinces dealt with by he SAHRC with respect to housing are Mpumalanga, Free State, Gauteng, KwaZulu-Natal and Northern Cape. The Greater Johannesburg Metropolitan Council (GJMC), being the only local sphere of government to respond to the SAHRC's protocols, is the only one dealt with in the report.

5.2.1.1 National Department of Housing

The principal national laws in this regard, which the SAHRC considered, are *The Development Facilitation Act*,[3] *The Extension of Security of Tenure Act*[4] and *The Housing Act*[5]. The policy document to which the SAHRC gives consideration is the *White Paper on Housing*. The SAHRC analyses the data in terms of the concepts: adequate housing; progressive realisation; respect for, protection, promotion and fulfilment of the right.

5.2.1.1.1 Adequate Housing

The SAHRC is satisfied that government understands its obligations in terms of the right of access to adequate housing. The way government understands this obligation is that everyone must have the opportunity "to exercise a choice in respect of housing options, and to access such elected options".

Once reference is made to adequate housing, the question as to the precise meaning of the term must inevitably arise. The SAHRC makes reference to government's understanding of the term, and states that it does not expressly reflect the definitions of the ICESCR. To comply with the provisions of the ICESCR, government's understanding must make reference to "legal security of tenure, availability of services, materials, facilities and infrastructure, the affordability, the accessibility, the location or the cultural adequacy of the housing".[6] And then it observes that the laws referred to in Section 5.2.1.1 hereof above do in fact take cognisance of these issues to a significant extent.[7] Further, the SAHRC states that

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3 Act No 67 of 1995.

4 Act No 62 of 1997.

5 Act No 107 of 1997.

6 SAHRC, 1998, Vol. IV, p. 1.

7 SAHRC, 1998, Vol. IV, p. 1. See, indeed, Section 3.2.3.3 of this report in respect of legal security of tenure. If one accepts, as the SAHRC suggests, that there is a disjunction between the data supplied by the official(s)

existing legislation[8] makes provision for "habitable, stable and sustainable public and private residential environments" in its definition of "housing development".

One can infer from these that the construction the SAHRC places on "adequate housing" is that:

- The addressee of the right must have legal security of tenure;
- Government must provide certain unspecified services, materials, facilities and infrastructure;
- The housing must be affordable and accessible;
- Cultural factors must be taken into account in determining the adequacy of the house;
- The housing must be habitable, stable and sustainable;
- The housing must afford its inhabitants adequate protection against the elements of nature;
- The housing must afford its inhabitants reasonable levels of privacy; and
- There must be sanitary facilities.[9]

In my view the considerations around infrastructure and cultural factors are germane to the meaning of "adequate housing". So are the considerations around services, certain materials, habitability, stability and sustainability of the housing. However I think it is necessary to spell out more precisely what is entailed in some of those considerations, rather than leave the matter vague. To leave the matter vague would make it difficult, almost impossible, to measure progress, since there is no clear indication of what is expected. Therefore it seems to me that, for instance, under infrastructural adequacy we could, without limiting the ambit of the right, nevertheless specify requirements like:

- Electrification of the houses and streets;
- Running water; and
- Effective communication facilities, including road and transport networks and tele-communication services.

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who completed the protocols and provisions of the law covering the subject of investigation, it seems to follow that the officials are not always aware of the laws having a bearing on the issues they deal with. The possibility therefore exists that, in giving effect to the right to housing, they might short-change the addressees of the right.

8 *The Housing Act.*

Under cultural factors we might specify, among others, that people's different cultural and traditional patterns will be taken into account in determining whether, in any given set of circumstances, the housing is adequate. These factors would include considerations such as the prevalence of the institution of the extended or the nuclear family, as the case may be, among different groups. Therefore, in my view, the size of the family has to be factored into the inquiry whether any given house is adequate.

Under *services* we could specify, amongst others:

- Effective refuse removal; and
- Effective servicing and maintenance of all infrastructures provided.

The relevance of *affordability* and of *security of tenure* to the issue of *adequate housing* is not obvious and need some elaboration. There can be no doubt about the importance of affordability and of security of tenure, but I think that conceptually those speak to a different question. A house could, in a given set of circumstances, be adequate but not affordable and vice versa. Similarly, one could have secure tenure without the house being adequate and vice versa.

Because socio-economic rights are so important, and because they have so many detractors, I think that it is vital that some analytical rigour be shown in articulating them. Lack of analytical rigour in the concepts used to convey socio-economic rights must inevitably lead to the rights not being taken seriously and therefore being discredited.

5.2.1.1.2 The Duty to Respect

The state's duty to respect the right to "adequate housing" consists in the state refraining "from taking any action which prevents people from satisfying the right when they are able to do so themselves". [10] The SAHRC is of the view that the *Housing Act* and the *Prevention of Illegal Evictions from and Unlawful Occupation of Land Act* are evidence of government's fulfilment of its duty to respect this right.

The SAHRC further notes that there rests on the state an obligation to prevent unfair discrimination in the provision of access to adequate housing. According to the SAHRC, "the goal of equality in access to adequate housing requires special measures for certain sectors of the population".[11] The SAHRC lists the poor, the disabled, female-headed households,

[9] SAHRC, 1998, Vol. IV, p. 2.

[10] SAHRC, 1998, Vol. IV, p. 9.

[11] SAHRC, 1998, Vol. IV, p. 9.

children, the youth, the elderly, farm workers and rural households as groups in need of special measures with regard to the right of access to adequate housing.

I am of the view that the SAHRC's analysis is confused in this area. The SAHRC, as we have pointed out, takes the view that the duty to respect the right of access to adequate housing is a negative one and consists merely in the state refraining from taking action that impedes citizens from providing for themselves. There is support for this proposition in the literature on the meaning of the duty to respect a right.[12]

Therefore the matter the SAHRC should investigate in this regard is whether the state does anything the effect of which is to hinder citizens in their efforts to provide housing for themselves. Understandably, this inquiry would include a consideration of laws and policies that might have that effect. It should not be necessary to inquire into measures the state has undertaken *in order to help* any of the groups mentioned by the SAHRC to have access to adequate housing in discussing this aspect of the right. In fact, the whole notion of some groups being vulnerable and therefore requiring special measures in the interests of equality sits awkwardly in this discussion. Therefore the discussion of laws and schemes the government has put in place should not be part of this discussion and belong, on a proper construction, to a different place. *Helping* any person or group is a positive act and therefore something not required by the duty now under consideration.

Similarly, the SAHRC's proposition that the duty to respect the right entails the prohibition of unfair discrimination in the provision of access to adequate housing seems a contradiction in terms. If the duty of respect conveys only the idea that the state should abstain from acting in an obstructive manner when people try to fulfil the right to adequate housing by their own means, state intervention aimed at prohibiting unfair discrimination is part of a different discourse.

An interesting question that arises in this context is whether a discussion of the repeal of laws that had the effect of obstructing citizens from fulfilling their right to adequate housing can be properly entertained in this section.[13] The existence of such laws clearly indicates the state obstruction that is prohibited by the duty of respect imposed on the state. Not to repeal such laws would therefore have perpetuated the obstructive state conduct that is prohibited.

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[12] See Craven, 1995, p. 109.

[13] See SAHRC, 1998, Vol. IV, p. 7.

As indicated above, the SAHRC indeed discusses the matter in this section. My view is that the discussion does not belong in this section where, by definition, the state is not required to do anything but merely to abstain from obstructive conduct. When the state removes its own obstructive conduct as reflected in its laws, it is *doing* something and not *refraining* from acting obstructively. The objection should not be read to suggest that the state should not repeal such legislation — only that the discussion belongs to a different section.

5.2.1.1.3 The Duty to Protect

The duty to protect the right of access to adequate housing requires that the state prohibit "any possible violation of this right by other more powerful individuals and groups in society".[14] Such protection would include measures such as:

- The prohibition of unreasonable rent and/or unreasonable increases thereof; and
- The prohibition of eviction from a house or land one occupies except in accordance with the directives of relevant legislation.

The SAHRC accordingly finds that the *Rent Control Act,*[15] the *Prevention of Illegal Evictions from and Unlawful Occupation of Land Act*[16] and the *Extension of Security of Tenure Act*[17] concretise the state's compliance with its duty to protect the right of access to adequate housing.

I think that this would be the place where one discusses the repeal of laws that are obstructive of citizens' right of access to adequate housing, for one of the "powerful groups in society" that the SAHRC refers to is indeed the state. Similarly, the discussion on the state protecting citizens from unfair discrimination in the acquisition of access to adequate housing, belongs to this section.

5.2.1.1.4 The Duty to Promote

The SAHRC combines the duty to promote and the duty to fulfil the right of access to adequate housing under one heading, and writes:

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[14] SAHRC, 1998, Vol. IV, p. 8.

[15] Act No 80 of 1976.

[16] Act No 19 of 1998.

[17] Act No 62 of 1997.

> ... the duty to promote the right of access to adequate housing means that the government must educate the public about their rights, and must strive to create a culture in which the right of access to adequate housing can become a reality.[18]

The SAHRC proceeds and details mechanisms that the government has put in place for the purpose of promoting the right of access to adequate housing and these are by way of:

- An ongoing communication campaign aimed at informing people about the National Housing Programme;
- Housing support centres that are established in residential areas for the purpose of informing people about possibilities and options that are available with regard to housing; and
- A website that can be visited on the internet for accessing information on housing.

The SAHRC indicates that it was not able to assess any of the measures stated above, since relevant documentation was not provided. In view of the time constraints the SAHRC faced,[19] it is perhaps possible to understand why it did not call for the relevant documentation. But that cannot be an excuse for the Commission's failure to browse the department's website in order to check what information is available there and the extent to which such information lends itself to analysis. Similarly, the Commission's failure to problematise the materials and concepts it is working with militates against a sympathetic view of the real problems it might have had in analysing the data. An example of this can be found in the way it articulates the duty to promote the right of access to adequate housing, quoted above.

What does it mean to "create a culture in which the right of access to adequate housing can become a reality"? The "becoming a reality" part of the definition seems to me to belong to the duty to *fulfil* the right, rather than the duty to *promote* it. Assume, however, for a moment that it is also relevant to the duty to promote the right.

The problem one then faces is that the entire text on the subject suggests that what the SAHRC was dealing with was the promotion of the right in the sense of making people aware of it and of how they can access it. Therefore it would be hard to arrive at the conclusion that the Commission was concerned, however remotely, with the actualisation of the right of

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[18] SAHRC, 1998, Vol. IV, p. 9.

[19] I have in mind here the fact that the Commission had to table a report to parliament at the beginning of the year.

access to adequate housing in this section. But let us suppose that by making the right a reality, one is also thereby promoting (advancing) it. Then one might expect that the Commission would write its report in such a manner that its awareness of the different constructions that might be placed on the word "promote" is clear. But it does not. In any event, if one promotes the right by making it a reality, why would the state bear the duty both to fulfil and to promote the right? It seems clear to me that the obligation is spelled out in a dual way because it is a dual obligation — i.e. government is expected to do two things. If we conflate the two, and speak about them as if they were one, we create an environment where the state might select the easier of the two possibilities and do that only.

5.2.1.1.5 The Duty to Fulfil

The SAHRC does not define this duty having subsumed it, as it were, under the duty to promote the right of access to adequate housing. Craven defines the duty, however, in the following words:

> The "obligation to fulfil" requires the State to take the necessary measures to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual.[20]

Consequently, the duty to fulfil the right requires that the state must take action towards the actualisation of the right. I think that the SAHRC communicates this sentiment too, where it writes "in order to fulfil the right of access to adequate housing, the National Housing Subsidy Scheme has been implemented".[21]

Although the Commission noted previously that it could not assess the National Housing Subsidy Scheme "due to documentation regarding the exact details of this policy not having been provided",[22] it discusses the scheme in a fair amount of detail. It refers to the scheme as "the cornerstone of government adhering to its obligation of fulfilling the right of access to adequate housing". The SAHRC indicates that:

- Subsidy amounts are allocated among provinces according to criteria such as population, income categories, existing informal housing, backlogs, urbanisation, etc.;
- Individual ownership subsidies are allocated to beneficiaries to assist them to acquire ownership of fixed residential property for the first time;

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[20] Craven, *supra,* p. 109.

[21] SAHRC, 1998, Vol. IV, p. 9.

- The subsidy levels are linked to household income;
- There are two types of individual ownership subsidies, namely project-linked subsidies and individual subsidies. The former affords housing opportunities to individuals in projects approved by the Provincial Housing Board. The latter enables individuals to acquire ownership of existing property or property not approved by the Provincial Housing Board;
- The consolidation subsidy enables people who received housing assistance from the state before the advent of the National Housing Subsidy Scheme to apply for further benefits in order to improve existing property;
- Institutional subsidies are available to institutions that provide affordable housing;
- All subsidies are paid out from the National Housing Fund in order to allow qualifying applicants to acquire residential property with secure tenure at an affordable price;
- The *Subsidy Implementation Manual* provides information on the housing subsidy scheme;
- Policies are being developed on the rural housing subsidy and on variation of the subsidy amount for disabled persons; and
- Government has set up various bodies such as the National Housing Finance Corporation and the Rural Housing Loan Fund.[23]

The SAHRC does not interpret or analyse any of the assertions referred to above. An attentive reading of the details provided in the report on the National Housing Subsidy Scheme suggests, however, that the Commission's statements are inconsistent on this matter. First, the details that it provides suggest that the Commission must either have read the relevant documentation or that sufficiently detailed information about the scheme was placed before it. Second, in order to judge the scheme as "the cornerstone of government adhering to its obligation of fulfilling the right of access to adequate housing", the Commission must be sufficiently familiar with the scheme's provisions.

It seems to follow, then, that the Commission's failure to assess the National Housing Subsidy Scheme cannot be ascribed, as it suggests, to relevant documentation not having being placed before it.

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[22] SAHRC, 1998, Vol. IV, p. 7.

[23] SAHRC, 1998, Vol. IV, pp. 9-10.

5.2.1.1.6 Available Resources

Section 26(2) of the constitution requires that "the state must take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation of [the right of access to adequate housing]". (My emphasis.) Therefore the state is required to institute legislative as well as other measures in order to bring about the actualisation of the right of access to adequate housing. The state can therefore be justified by two factors only in failing to bring about the realisation of the right of access to adequate housing — namely, that the action required of the state is not reasonable, and/or that it falls outside its available resources.

I take the view that there is no support in the language of Section 26(2) or indeed the constitution for supposing that the two factors have to be present contemporaneously. In any event it is possible to imagine that a course of action might fall within the resources available to the state, but that it might nevertheless be unreasonable for the state to follow that course of action. Similarly, a course of action that is reasonable might conceivably also fall outside of the state's available resources.

In this subsection I propose to consider the meaning of the qualification of the state's obligation to make adequate housing available by "its available resources". Notably, the SAHRC does not discuss this qualification. Therefore it does not, for instance, inquire whether, given the resources available to the state, the measures, legislative or otherwise, instituted by the state are satisfactory.

Craven writes that the qualification of the state's obligation by its available resources was never meant to exonerate states from the obligation to bring about the progressive realisation of the right of access to adequate housing. All that was conveyed by the qualification was that the general economic situation in every country would be a factor to consider in assessing state reports. Furthermore, the inquiry into the resources available to the state is an objective one and does therefore not depend on how individual states themselves assess their own resources. And, which is more, the allocation of resources within the state is not immune to scrutiny, and it is therefore possible to impugn the manner in which the state prioritises competing claims within its available resources.[24]

The SAHRC, as I have suggested, has confined itself, in assessing government's fulfilment of the right of access to adequate housing, to the policy and legislative sphere. Whereas it considers the National Housing Subsidy Scheme as the cornerstone of govern-

[24] Craven, *supra,* pp. 136-137 and 142-143.

ment's fulfilment of this right, it inquires neither into the houses the scheme has delivered, nor into the adequacy of those houses in terms of its own stipulations of what is to count as "adequate housing". The by-product of this omission is that the SAHRC does not address the question whether the state has given effect to its obligation, in the language of the ICESCR, to the maximum of its available resources.

That the SAHRC's approach is inadequate is underpinned by the *NEDLAC Annual Report* for the period 1 April 1998 to 31 March 1999. The report states that the provision of permanent housing is "an important part of protecting the poor against the negative health consequences that result from exposure to the elements". It further states that:

- 16% of South African households lived in informal dwellings in October 1996;
- 17% of South African households lived in single-room dwellings in the same period;
- 46,5% of South African households lived in 3-room dwellings in the same period; and
- the Department of Housing had allocated just over 200 000 housing subsidies in August 1998, of which women received 37%.[25]

The inadequacy of the SAHRC's approach is also underpinned by its own investigation, which revealed that 60% of its interviewees hold the view that government has not delivered on its promise to provide houses.[26] One might therefore have expected that the SAHRC would inquire into the progress made on these issues and pronounce on the adequacy of the dwellings referred to above.

The SAHRC's approach can possibly be justified in the light of Opsahl's argument, although he speaks of civil and political rights, that the content of state reports need only indicate measures they have adopted to give effect to the Covenant.[27] However it is significant that Opsahl himself subsequently argues as follows:

> The terms used in the Covenant — "measures", "progress", "factors", and "difficulties" — indicate that it is not enough to report solely on constitutions and laws or regulations relevant to the implementation of civil and political rights. The purpose of reporting also suggests that facts are as important as law. The consistent attitude of the Committee has confirmed what its guidelines might have perhaps made more clear that no matter how adequately the relevant rights are

[25] NEDLAC Annual Report, 1 April 1998 to 31 March 1999, p. 20. See also SAIRR, 2000, p. 164.

[26] SAHRC, 1998, Vol. VI, pp. v and 39. See also SAHRC, *Economic & Social Rights Report*, Vol. V, pp. 14-18.

> reflected on paper, the reports must also refer to actual practice. In this regard, statistical data is often useful and sometimes even necessary.[28]

To be able to evaluate the state's fulfilment of its obligation in terms of the right of access to adequate housing, one must therefore look outside of the SAHRC report. A useful place to start at would be the national budget. One would then have to establish the amounts committed by the state to the fulfilment of the right. And then one would also have to compare the allocation to other allocations in the national budget, and inquire whether the state's prioritisation is in line with the state's obligation to fulfil this right.

The total estimate of state (national) expenditure on housing for the period studied by the SAHRC (1999/2000) was R3 529 825b.[29] It is well worth noting that the expenditure was reduced by a whole R99 482m from the previous year's projected expenditure on housing. For the year 2000-2001 the national budget for housing is R3,3b and is therefore approximately R200 000m less than the previous year's provision.[30]

The available data suggest that the budgetary allocation with respect to the right of access to adequate housing has shrunk over the past two fiscal years. The data further suggest that the size of the budgetary shrinkage has itself increased substantially over those years. Therefore, not only has the state decreased expenditure on housing over the stated period — it has also increased the size of the decrease. Table 3 below in fact suggests that overall budgetary projections on housing decreased by some 65,9% between 1989/90 and 1999/00. In my view the shrinkage of money that the state budgets for housing in itself already affects the right of access to adequate housing negatively. However, even if the state held the budget constant in the period under review, a substantial portion of it would have been absorbed by inflation. To do justice to the right of access to adequate housing, therefore, it would have been necessary to adjust the budget upward. It consequently seems, then, that the budgetary reduction establishes, *prima facie*, a double denial of the right.

Craven writes that the "progressive achievement" of a right requires that its "implementation should be continued 'without respite' so that full realization could be achieved 'as quickly as possible'".[31] He suggests further that the duty to bring about the progressive

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[27] Opsahl, in Alston (ed.), 1992, *supra*, p. 400.

[28] Opsahl, *supra*, p. 401.

[29] See *Annexure 3*, "Estimate of Expenditure to be Defrayed from the National Revenue Fund during the Financial Year ending 31 March 2000", p. xviii.

[30] Fair Share, n.d., "*Summary of National Budget Expenditures*", p. 1.

[31] Craven, *supra*, p. 131.

realisation of a right implies that there must be no "backward movement of any kind".[32] The reduction in expenditure on housing, together with the progressive increase of that reduction, establishes precisely the respite that is precluded by the right. It has the effect that full realisation of the right cannot be achieved as quickly as possible. The progressive reduction in resources being made available for housing is precisely the retrogressive measure precluded by the duty to fulfil the right.

But that is not quite the same thing as violating the right. Craven notes that the Committee on Social and Economic Rights in its general comment does not necessarily consider "retrogressive measures" as violations of the ICESCR. The Committee accepts that retrogressive measures may be fully justified by an economic crisis that would render such retrogressive measures inevitable. Further, retrogressive measures may be introduced if the purpose is to improve "the situation with regard to the 'totality of the rights in the Covenant"'.[33]

The question that arises, then, is whether, in the context of South Africa, the reduction of expenditure on housing can be justified on the basis of the considerations mentioned above. That South Africa is in no such crisis as the Committee envisaged is self-evident. Therefore the budgetary reduction on housing cannot be justified on that basis. It is not quite so easy to answer the second question — i.e. whether the reduction can be justified in terms of an overall improvement of other rights named by the ICESCR. To try and answer that, one must compare how those other rights have fared in the same period.

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[32] Craven, *supra*, p. 131.

[33] Craven, *supra*, pp. 131-132.

Table 2: National Budget Allocations for Socio-Economic Rights: 1998/1999:1999/2000

Budget Item	Rand 1998/99	% Budget	Rand 99/00	% Budget
Housing	R3,6b	1,8	R3,5b	1,6
Education[34]	R46,3b	22,1	R48,5b	22,4
Health care	R23,2b	12,2	R24,0b	11,1
Water[35]	R2,9	1,1	R2,5b	1,1
Welfare/Social security	R19,3b	9,7	R19,6b	9,1[36]
Environment	R463m	0,23	R632m[37]	0,29
Agriculture (food)	R718,8m	0,33	R637m	0,31

Source: Fair Share, *Summary of National Budget Expenditures*

Table 2 suggests that, although state expenditure on education, health care, social security and the environment, expressed in absolute figures, has increased, each of these items has received less than the previous allocation, expressed as a percentage of the total budget. The environment is the only budget item that fares well both in absolute figures and as a percentage share of the total budget, and then only by a fraction of a percentage.[38]

But I do not think that much can be made of the environment budget item, since it is combined with tourism. South Africa has been on a serious drive to attract tourists for the past six years. It would therefore be safe to surmise that a substantial portion of this budget item would go to the service of tourism rather than the advancement of the right to an environment that is not harmful to the health or well-being of the citizens. Whilst water gets a bigger allocation, expressed in absolute figures, it fares no better than in the previous year, expressed as a percentage share of the total budget. Expenditure on food as represented by

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[34] It would probably be fair to take into account parts of the budget on arts, culture, science and technology in this budget item, since much of it has an inherently educational value. The arts, culture, science and technology budgets for 1998/1999 and 1999/2000 respectively were R738m and R804m. This reflects a nominal increase of R66m but in real terms a decrease of 1,2% — Fair Share, *Summary of National Budget Expenditures*, 1998/1999 and 1999/2000.

[35] This budget item also includes sanitation. Sanitation is not only a water issue but a health as well as an environmental issue as well. Therefore one would have to take this into account in debating the adequacy of the health and environmental budgets. The flip side of this concession is that one then also has to reduce the expenditure on water *qua* water (*Section 27(1)(b)* of the constitution) by the amount of the water budget that would have been spent on water as a health and as an environmental issue. It is further worth noting that this budget item was increased by a further R120m on 16 March 1999 — Fair Share, *Summary of National Budget Expenditures*, 1998/1999:1999/2000.

[36] In the source document this is discussed under the heading "Pension", but Fair Share indicates that under that heading is subsumed the whole concept "social welfare".

[37] Included in this category is also *tourism*. I have calculated the % myself in respect of the environmental expenditure, since Fair Share did not have percentages in respect of this subject. For the period 1999/2000 I calculated the % on a total of R216,8b and for the period 1998/1999 on a total of R205b. The totals are derived from Fair Share, *Key Elements of the 1999/2000 Budget* and *Key Elements of the 2000/2001 Budget* respectively.

[38] A budgetary change by 0,5% and less is insignificant — see Fair Share, *2000/01 National Budget Handbook*, p. 7.

expenditure on agriculture, takes a nosedive. Holistically viewed, therefore, the possibility to justify the reduction in state expenditure on housing on the basis of an overall improvement of other ICESCR rights remains open to challenge. In considering state expenditure on the right to food (agriculture), one has to bear in mind that the implementation of the right resides with four departments — viz. Agriculture, Welfare, Health and Finance.[39] Although the spread over four departments affects the total funds available, I suggest that it does not affect the comparison since the spread applied in the previous year as well.

In assigning value to the budgetary allocations one must of course bear in mind that not all the budgeted funds actually go towards providing houses. A fair amount of these go towards administrative and other expenses. In the period studied by the SAHRC, for instance, the projections were:

Table 3: Projected Application of National Housing Budget

Budget Item	**Amount**		
	89/90	90/00	% Increase
Administration	R28 177m	R30 483m	7,5
Policy Development	R226 097m	R49 656m	(78,03)
Housing Performance	R457 725m	R469 844m	2,58
SA Housing Fund	R2 909 713b	R2 971 121b	2,06
Total	**R3 621 712b**	**R3 521 104b**	**(65,89)**

Source: *RSA Estimate of Expenditure*[40]

The table suggests that of the budgeted total for housing, R2 971 121b (82,6%) went to the South African Housing Fund and possibly, therefore, towards the actual provision of houses. This represents an increase of 2,6% in comparison with the budget allocation towards housing in the previous year. Although very substantial (78,03%), the decline in the budgetary allocation towards policy development seems perfectly understandable. It would have been surprising if the state maintained high-level expenditure on policy development, for there must come a point where it concentrates on policy implementation, rather than development. The table further suggests that provision for administration costs increased by 7,5%. It is therefore once again remarkable that of the budget items that increased in the period under review, the money allocated for actual provision of houses experienced the least growth, expressed as a percentage of the allocations.

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[39] SAHRC, 1998, Vol. IV, p. 21.

[40] RSA, *Estimate of Expenditure to be Defrayed from the National Revenue Fund during the Financial Year ending 31 March* 2000, pp. 16-19. See also HRC *Quarterly Review*, October 1999, p. 47 by way of example of how a province might apply the funds.

I suggested earlier that it is necessary to inquire into the state's prioritisation of the competing claims to its resources in order to make sense of its fulfilment of the obligation to give effect to the right according to available resources. In doing so, I shall not pitch one socio-economic right against another. Quite apart from the fact that I have already done that, it would, as I have already suggested, be permissible for the state to treat one socio-economic right somewhat less favourably than another so as to bring overall improvement in respect of the ICESCR. What I undertake to do, therefore, is rather to compare state expenditure on socio-economic rights and unrelated budget items. Specifically, I propose to compare state expenditure on socio-economic rights with state expenditure on interest on the debt, security, central statistical services, constitutional development and local government, correctional services, foreign affairs, home affairs, justice, public enterprises, public service commission, revenue services, government communication, and trade and industry.

Table 4: State Expenditure on Socio-Economic Rights and other Interests

Budget Item	**Amount 1998/99**	**%**	**Amount 1999/00**	**%**
Interest on Debt	R43,8b	20,7	R48,2b	22,2
Education	R45,4b	22,1	R48,5b	22,4
Security	R34,3b	16,1	R35,5b	15,1
Health care	R23,2b	12,2	R24,0b	11,1
Welfare	R19,3b	9,7	R19,8b	9,1
Transport	R3,2b	1,6	R3,5b	1,6
Housing	R3,6b	1,8	R3,5b	1,6
Water	R2,9b	1,1	R2,4b	1,1
Trade/Industry	R2,4b	1,1	R2,1b	0,9
Central Statistical Services	R92,6m	0,45	R141m	0,07
Constitutional Dev. & Local Gov.	R3,0b	1,46	R3,2b	1,48
Correctional Services	R4,3b	2,1	R4,5b	2,08
Foreign Affairs	R1,2b	0,59	R1,2b	0,55
Home Affairs	R1,1b	0,54	R1,3b	0,6
Justice	R2,12b	1,03	R2,35b	1,08
Public Enterprises	R28m	0,14	R31m	0,14
Public Service Commission	R27,6m	0,14	R50,6m	0,24
SA Revenue Services	R1,7b	0,83	R1,86b	0,86
Govt. Communication & Info	R46,8m	0,23	R48,2m	0,22
Total[41]	**R205b**	**100**	**R216,8b**	**100**

Source: Fair Share, *Summary of National Budget Expenditures: 1998/99:1999/00.*

[41] As a result of some budget items not being stated, the totals do not add up. From Central Statistical Services through to "Govt. Communication & Info", Fair Share offered no percentages and I have therefore myself calculated those.

An examination of the above table suggests the following order of priorities:

(1) Education; (2) Interest on Debt; (3) Security; (4) Health Care; (5) Welfare; (6) Correctional Services; (7) Transport and Housing; (8) Constitutional Development and Local Government; (9) Water; (10) Justice; (11) Trade and Industry; (12) SA Revenue Services; (13) Central Statistical Services; (14) Home Affairs; (15) Foreign Affairs; (16) Public Service Commission; and (17) Government Communication and Information System.

Consequently, of the sampled budget items education receives top priority. It is significant that three of the top five budgetary priorities are related to socio-economic rights. It remains possible to bemoan the fact that housing only features at position seven and that debt service eats up so much of our national budget. It seems trite, however, that it is not now possible to assail government's priorities on the basis that they elevate other interests at the expense of socio-economic rights. It is instructive, though, to examine how budgeting priorities have changed in the period 1995-2000.

In discussing changes in budget priorities in the period under review, it is necessary to state that the National Party drew up, that is, the 1995/96 budget.[42] Table 5 indicates that financial planning on housing was cut by 50% in the first budget the ANC drew up, that is, for the period 1996/97, and that it was more than doubled in the next financial year. But then it was cut again in 1998/99 and even further in 1999/00. The result is that, expressed as a percentage, the budget on housing reflects a negative average increase of 0,075% in the period under review. And that is before one includes inflation.[43]

Table 5: Changes in Budgetary Priorities between 1995 and 2000

Budget Item	R95/96	%	R96/97	%	R97/98	%	R98/99[44]	%	R99/00	%
Int. on Debt	28b	25,5	34b	19,5	39,6b	20,0	43,8b	20,7	48,2b	22,2
Education	31b	20,0	35b	19,8	40b	21,0	45,4b	22,1	48,5b	22,4
Security	21b	13,5	24b	13,3	30b	17,0	34,3b	16,1	35,5	15,1
Health care	15b	10,0	17b	9,8	20b	11,0	23,2b	12,2	24b	11,1
Welfare	16b	10,5	14b	7,6	18b	10,0	19,3b	9,7	19,8b	9,1
Transport	3b	1,9	3b	1,8	3,3b	1,7	3,2b	1,6	3,5b	1,6
Housing	3b	1,9[45]	1,5b	0,8	4b	2,0	3,6b	1,8	3,5b	1,6
Water	0,9b	0,6	2,4b	1,4	2,1b	1,0	2,9b	1,1	2,4b	1,1
Trade & Industry	3,5	2,3	3,3b	1,9	3b	1,6	2,4b	1,1	2,1b	0,9

Source: Fair Share, *Key Elements of the 1997/98 Budget.*

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[42] Fair Share, *2000/01 National Budget Handbook*, p. 7.

[43] Fair Share, *2000/01 National Budget Handbook*, p. 6.

[44] I have extrapolated the figures for 1998/1999 & 1999/2000 from Table 4 above.

[45] Fair Share reflects this as 3,4% (*Key Elements of the 1997/98 Budget*, p. 2). But this is of course wrong arithmetic, and Transport, just above Housing, also at R3b, is reflected as 1,9%.

Overall, therefore, the available data suggest that the state has undertaken retrogressive measures insofar as the right of access to adequate housing is concerned since the current government came into office. As I have suggested, it does not seem that these retrogressive measures can be justified on the basis of an overall improvement of other socio-economic rights. Could they, perhaps, be justified on the basis of an economic crisis?

Table 6: SA's GDP: 1995-2000

Year	GDP (at current prices)	Population	GDP per head (current prices)	Nominal increase in GDP per head	Real GDP (at constant 1995 prices)	Increase (decrease) in real GDP	Real GDP per head	Real increase (decrease) in GDP per head	CPI
1995	R548,1b	39 477 100	R13 884	-	R548,1b	-	R13 884	-	8,7%
1996	R618,4b	40 342 300	R15 329	10,4%	R570,9b	4,2%	R14 150	1,9%	7,4%
1997	R683,7b	41 226 700	R16 584	8,2%	R585,3b	2,5%	R14 196	0,3%	8,6%
1998	R740,6b	42 130 500	R17 579	6,0%	R588,9b	0,6%	R13 979	(1,5%)	6,9%
1999	R795,1b	43 054 300	R18 467	5,1%	R594,8b	1,0%	R13 815	(1,2%)	5,2%
2000	R865,9b	44 001 500	R19 679	6,6%	R615,4b	3,5%	R13 986	1,2%	5,0%

Source: SAIRR, *Fast Facts, April 2000*, p. 3.

It is evident from Table 6 that, overall, SA's GDP declined between 1995 and 2000. But it is also evident that it grew from 0,6% in 1998 to 1,0% in 1999. In any event Table 6 does not paint a picture of a country whose economy is in a crisis. Therefore the state's retrogressive measures in respect of the right of access to adequate housing cannot be attributed to an economic crisis.

Previously I indicated that the state's failure to discharge its constitutional obligation with reference to socio-economic rights can be excused either on the basis of a lack of resources or on the basis that the measures advocated are unreasonable. Presumably, retrogressive measures could also be justified on the same bases.

It does not seem to me possible to sustain a claim that the state's retrogressive measures in respect of the right to adequate housing were necessitated by a lack of resources. The total budget for the relevant years was R153b (1995/96); R196b (1997/98); R205b (1998/99) and R216,8b (1999/00). Therefore, expressed in absolute terms, the budget size has been increasing steadily in the relevant period. What we see instead is that as the budget size increased, the slice of it that went towards housing shrank, expressed both in absolute terms and as a percentage of the budget.

It remains, then, to consider whether the retrogressive measures in respect of the right of access to adequate housing can be justified on the basis that they were reasonable. It is admittedly a Herculean task to undertake to say what is reasonable in any given set of circumstances. I take the view, however, that insofar as the constitution allows the state to plead reasonableness for not fulfilling a socio-economic right, one is entitled to venture an opinion on the question, provided only it is on a reasoned basis. The reasoning I propose to follow is that there is a clear constitutional injunction that the state shall fulfil certain socio-economic rights and that a deviation from this obligation can be justified on five grounds only. The said grounds are:

- That the state does not have the resources that are necessary in order to fulfil the rights;
- That, whilst the state might have the resources, it would nevertheless be unreasonable for it to embark on the action required for the fulfilment of the rights;
- That the rights have been fully realised already;
- That there was a crisis as a result of which the deviation was inevitable; and
- That the deviation was in pursuit of an overall improvement with regard to other ICESCR rights.

Now, the two last-mentioned grounds are admittedly not in the text of the constitution. However they are an authoritative interpretation of the ICESCR by the Committee on Social and Economic Rights. About the fact that the socio-economic rights enshrined in our constitution emanate from the ICESCR, there can be no debate. Therefore I think it is permissible to inquire into the extent to which the conduct of the state is in line with the interpretation by the Committee on Social and Economic Rights' of the ICESCR in investigating whether, in our endeavour to give effect to that covenant, we have acted reasonably.

If, however, it turns out that I am mistaken in this view, the state's deviation becomes even less sustainable in reason, since we then have to judge it basically on two grounds only, being **availability of resources** and **reasonability**. Since reasonability is the question we have to answer, it could not possibly form part of our attempt to answer the question. Therefore we would be left with one yardstick only, namely available resources.

In short, therefore, I maintain that the state acts reasonably if it gives effect to the injunctions of the constitution or, alternatively, if its conduct can be justified on the grounds mentioned above. Conversely, the state acts unreasonably if it fails to give effect to the

injunctions of the constitution in circumstances where the failure cannot be justified on the grounds mentioned above.

Barring the defence that the right has already been fully realised, I have already discounted the possibility that the deviation might be justified in terms of any of the grounds mentioned above. Therefore there remains one question only, namely, whether we could say in South Africa that the right of access to adequate housing has already been fully realised. This is essentially an empirical question and ought to give rise to no serious problems. I referred earlier to the NEDLAC, SAIRR and indeed the SAHRC's findings on this matter, which suggest that the right is far from full realisation. Table 7 shows the housing shortage in South Africa during the period studied by the SAHRC.

Table 7: Shortage of Houses by Province in SA

Province	Shortage	Proportion of total shortage	Shortage as proportion of total provincial households	Number of houses to be built in 1999	Houses to be built as proportion of housing shortage
Eastern Cape	338 239	13%	25%	152 000	45%
Free State	132 323	5%	21%	69 000	52%
Gauteng	836 784	32%	42%	243 000	29%
KwaZulu-Natal	473 214	18%	28%	195 000	41%
Mpumalanga	109 825	4%	18%	53 000	48%
North West	296 561	11%	41%	70 000	24%
Northern Cape	20 462	1%	11%	18 000	88%
Northern Province	180 667	7%	18%	86 000	48%
Western Cape	215 642	8%	22%	114 000	53%
South Africa	**2 603 717**	**100%**	**29%**	**1 000 000**	**38%**

Source: SAIRR, *South Africa Survey 1999/00*, p. 166.

In analysing Table 7, one may note the fact that the housing backlog is estimated less conservatively by others. Rick de Satge and Colleen Morna, for instance, estimated the backlog at between three and four million in July 1996.[46] With reference to "houses to be built" the SAIRR clearly proceeded on the basis of undertakings the ANC made before becoming the governing party. However on government's own admission the goal of a million houses was not attained. By March only account for 38% of the total housing shortage. It is obvious therefore that in terms of government's own planning the country is nowhere near to full realisation of the right of access to adequate housing. Therefore the

[46] Rick de Satge and Colleen Morna, *Homeless Have Little Hope of Help from Government*, Reconstruct: Mail & Guardian, July 12 to 18, 1996.

retrogressive measures government has introduced in respect of this right cannot be justified on the basis that the right has been fully realised.

If the reasoning outlined above is accepted, it seems to me quite clear that it is not possible to advance any justification at all for government's retrogressive measures in respect of the right of access to adequate housing.

5.2.1.2 National Department of Correctional Services

The SAHRC's report in this regard deals with conditions such as protection from the cold, dampness, heat, structural hazards and overcrowding. It states that no supporting documents were supplied to show that the conditions in prison are in accordance with public health legislation.[47]

This section of the SAHRC's analysis is not particularly helpful. But, in any event, I am not sure that it was a viable thing to do to try and study housing issues with reference to the Department of Correctional Services. If the SAHRC had meant to do a meaningful study of this nature, it would in my view have been necessary to work out what the same terms mean in different contexts. That prisoners have socio-economic rights seems to me a matter about which there can be no debate. However I think we would require a different vocabulary in order to study the socio-economic rights of prisoners, from the one we use in studying socio-economic rights in general. The following terms or concepts seem to me obviously inappropriate in studying the socio-economic rights of prisoners:

- Legal security of tenure;
- Affordability of the house;
- Cultural factors — at least as I defined them in this study;
- Privacy; and
- The state refraining from interfering with the person from satisfying the right him/herself.

Although it seems obvious that one cannot raise these issues in studying the socio-economic rights of prisoners, there is no indication in the SAHRC's report that it has considered this. In any event the SAHRC has a national prisons project in terms of which it monitors conditions in prison and the treatment of prisoners generally. I think that the project would have been an adequate basis for considering some of the things it wanted to examine in the current study.

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[47] SAHRC, 1998, Vol. IV, p. 10.

Therefore it was not necessary in my view to force the issue into its constitutional mandate to monitor the implementation of socio-economic rights.

5.2.1.3 Provincial Housing Departments

The government's housing policy is implemented through the provincial governments. The provincial governments that answered the SAHRC's protocols were mentioned in Section 5.2.1 hereof.

5.2.1.3.1 The Mpumalanga Department of Housing

The SAHRC states that different directorates within the department responded to the questionnaire and that it is therefore not possible to gauge "a full picture of the housing situation within the province". It proceeds and states that numerous initiatives were referred to in the replies to the questionnaire, but that no comprehensive overview of the housing situation in the province was provided.[48] Nothing more substantial is mentioned.

In my view the fact that numerous directorates answered the questionnaire is not a sufficient reason for the SAHRC not analysing the data those directorates supplied. So far from being disabling, the fact is the basis for thorough-going analysis. The fact that different directories answered the questionnaire means that it would have been possible to compare and crosscheck what those directorates said, and probably get a more balanced picture of the housing situation in the province than if a single directorate had answered.

And, which is worse, the SAHRC does not even tell us what those directorates said, and so we cannot assess the situation ourselves.

5.2.1.3.2 The Free State Department of Housing

The SAHRC states that the department provides a comprehensive list of initiatives undertaken in the province in order to ensure the realisation of the right. It finds that this list reflects "an overall picture of the housing situation within the province". It however also finds that, on account of there being no NGO input on the matter, and also due to lack of supporting documentation, the accuracy of the department's information cannot be vouched for.[49]

The SAHRC's assessment of the housing situation in the Free State seems manifestly inconsistent. On the one hand, the SAHRC finds that it is in a position, on the basis of the

[48] SAHRC, 1998, Vol. IV, p. 11.

[49] SAHRC, 1998, Vol. IV, p. 12.

data, to assert that it has "an overall picture of the housing situation within the province". And then in the same breath it finds that it cannot vouch for the accuracy of the information at its disposal. If indeed the department provided a comprehensive list of initiatives undertaken in order to ensure the realisation of the right of access to adequate housing in the province, it should be possible to analyse that list without reference to the NGO input. In any event there are grave methodological problems about the gathering and analysis of data from the NGO community.[50] Therefore it is doubtful that the input, if the SAHRC had it, would advance the credibility of the other data that it worked with from government sources.

5.2.1.3.3 The Gauteng Department of Housing

The SAHRC states that the department has undertaken two initiatives within the province in order to ensure the realisation of the right. These initiatives are by way of two statutes, namely the *Provincial Housing Act* and the *Landlord and Tenant Act*. Then the SAHRC states that the accuracy of the information from government sources could not be determined due to lack of supporting documentation and an NGO input. The SAHRC further states that the initiatives indicated by the department "by no means reflect a clear overall picture of the housing situation within the province".[51]

One might expect the SAHRC to analyse the statutes referred to and indicate their adequacy or inadequacy for bringing about the realisation of the right in the province. It does not even indicate what the provisions of those statutes are, so that we might ourselves judge whether they are adequate or not.

5.2.1.3.4 The KwaZulu-Natal Department of Housing

The SAHRC states that the department referred to some initiatives, such as the Provincial Housing Strategy, to address the realisation of the right but that no supporting documentation was provided. It states further that there was no NGO input. Therefore it was unable to assess the picture with regard to the housing situation in the province.[52]

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[50] See Chapter 4 hereof. Since this is a recurring reservation the SAHRC raises in a number of provinces, I shall not repeat this in discussing other provinces, although this critique must stand in respect of those provinces too.

[51] SAHRC, 1998, Vol. IV, p. 12.

[52] SAHRC, 1998, Vol. IV, p. 12.

5.2.1.3.5 The Northern Cape Department of Housing

The SAHRC notes merely that the information received from the department was incomplete and vague and that there was no NGO input. Then it asserts that the housing situation in the province could not be gauged.[53] However it does not say in what respects the information is incomplete and vague. Nor does it table the information it received so that the readers can themselves assess it.

5.2.1.3.6 A Critique

In setting out the Commission's analysis of the data, I have already expressed some criticism thereof. I have also indicated that provincial governments are on the coalface of delivery in respect of the right of access to adequate housing. Therefore one might have expected the Commission to be rigorous in analysing the provinces' data insofar as the right is concerned. What we have instead is a refrain in respect of all provinces dealt with that it was impossible to assess the housing situation.

Whereas some of the concerns raised by the Commission are legitimate and indeed have a bearing on the analysis of the data — e.g. lack of supporting documentation — it is in my view unacceptable that the Commission failed to analyse the data that it did have before it. But even with reference to the lack of supporting documentation it is noteworthy that other institutions — e.g. the Human Rights Committee and the South African Institute of Race Relations — were able to access the relevant information and made an informed analysis of the housing situation in the provinces. Table 7, for instance, details the housing shortage by province in South Africa even if, as I have suggested, some studies fix the backlog somewhat higher than it appears in Table 7. Table 8 shows the delivery of houses by province between April 1994 and March 1999 (and therefore up to the end of the period studied by the SAHRC).

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[53] SAHRC, 1998, Vol. IV, p. 12.

Table 8: Delivery of Houses: April 1994-March 1999

Province	Proportion of 1m target to be met	Actual number of houses to be built	Total number of subsidies approved	Houses built or under construction	Proportion of provincial target built or under construction
Eastern Cape	15,2%	152 000	93 773	78 393	52%
Free State	6,9%	69 000	52 278	57 434	83%
Gauteng	24,3%	243 000	328 030	177 802	73%
KwaZulu-Natal	19,5%	195 000	176 044	149 126	76%
Mpumalanga	5,3%	53 000	64 156	47 595	90%
North West	7,0%	70 000	84 697	60 631	87%
Northern Cape	1,8%	18 000	22 264	21 256	118%
N. Province	8,6%	86 000	89 890	49 750	59%
Western Cape	11,4%	114 000	124 029	103 730	91%
Total	**100%**	**1 000 000**	**1 035 161**	**745 717**	**75%**

Source: SAIRR, *SA Survey: Millennium Edition*, p. 168.

It was therefore not impossible, as the Commission suggests, to form a picture of the housing situation in the provinces. The Commission could either have called for the information, or it could have extracted it from other studies. The Commission's problem, it seems to me, was its legalistic approach to the study, rather than the absence of data. Indeed this is clear when one considers its analysis of data at the national level, where it did not necessarily have similar problems with the data supplied. Yet a clearer picture of the housing situation in South Africa does not emerge from the Commission's analysis of that data set.

Further, the SAHRC's analysis is contradictory in places. I have already referred to some of this in setting out their analysis. It is noteworthy that, in dealing with the way departments answered the questionnaire, the Commission asserts, with reference to the Free State, that it "provided an excellent overview of what is being done to realise the right of access to adequate housing".[54] If it is so, how must one understand the Commission's contention that it is not possible to assess the housing situation in the Free State? Why is the department's overview "excellent" if it does not shed any light on the housing situation in the province?

5.2.1.4 Local Governments

As it was pointed out previously, the Greater Johannesburg Metropolitan Council (GJMC) is the only local government that answered the SAHRC's questionnaire. The Commission states

[54] SAHRC, 1998, Vol. IV, p. 18.

that the GJMC made no reference at all to the right in its answer. Further, the Commission finds that such reference would in any case have been impossible since the GJMC takes the view that local government has no role to play in the realisation of the right in the first place.[55]

The SAHRC takes the view that the GJMC is mistaken in believing that local government has no role in the realisation of the right of access to adequate housing, as the relevant legislation is clear on the matter.[56]

5.2.2 Health Care

The SAHRC discusses this right under two headings, namely "National Department of Health" and "Provincial Governments".

5.2.2.1 National Department of Health

The Commission does not present the data submitted by the department. It states instead that the data do not reflect a clear understanding of the different obligations, namely to respect, protect, promote and fulfil the right. It finds that at times the department lists obligations belonging under one heading under the wrong heading. The Commission further finds that the department shows no commitment to primary health care, notwithstanding that this is the cornerstone of the World Health Organisation's Health for All Programme. Nor, as the SAHRC finds, does the department have a clear plan of action for implementing health rights.[57]

It is noteworthy that the Commission deals with health care at national level in four short paragraphs. Although it refers to the different obligations imposed on the state by the right, it makes no effort to analyse the department's data in accordance with those different obligations. The Commission says, of course, that the department itself confused those obligations. The department's confusion is, needless to say, unfortunate, since one must wonder how it hopes to give effect to the right if it is confused about the obligations created by the right.

However the department's confusion does not absolve the Commission from analysing the data. If the Commission was able to work out that this datum belongs here, rather than there, then it was possible to place it where it belongs and then do the analysis, rather than

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[55] SAHRC, 1998, Vol. IV, p. 16.

[56] SAHRC, 1998, Vol. IV, p. 20.

[57] SAHRC, 1998, Vol. IV, pp. 20-21.

content itself with criticising the department. There can be no question about the department having earned the criticism, but that fact does not absolve the Commission from doing the analysis required of it by the constitution.

5.2.2.2 Provincial Governments

The SAHRC deals with the provincial data in two sentences. It says the provincial governments provided fragmented information from which it is difficult to form a clear picture as to benchmarks and plans of action. Then it states that there seems to be no understanding on the part of provincial governments of their constitutional obligations in respect of health care services.[58]

5.2.2.3 A Critique

It is quite evident that the Commission's analysis of the data on health is inadequate. Reference was made to NEDLAC's report previously, where NEDLAC suggests that inadequate housing may have a negative impact on the health of the poor (Section 5.2.1.1.6 hereof). This position enjoys the support of the United Nations Commission on Human Rights.[59] That the housing situation in South Africa is not satisfactory seems to emerge clearly from Tables 7 and 8, together with the NEDLAC statistics (Section 5.2.1.1.6 hereof) read together with the SAIRR statistics.[60] If one accepts these, and the suggestion that housing has a bearing on the health of people, it would not be unreasonable to expect the Commission to deal more meaningfully with the data regarding the right to health care.

Further, the United Nations General Assembly resolved on 18 December 1982 that all people have an inherent right to life. It resolved that safeguarding this right is an essential condition for the enjoyment of the entire spectrum of socio-economic and other rights.[61] Now, a person's health has a direct bearing on his/her right to life. It is of course so that there is a view that this is not the proper meaning of the right to life. Fawcett, for instance, argues that points such as the one I argue are mistaken in that they fail to understand that "it is not *life* but *the right to life*, which is protected by law".[62] The United Nations Human Rights Committee, however, has stated explicitly that:

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[58] SAHRC, 1998, Vol. IV, p. 21.

[59] See E/CN.4/SR.222 at 17 (1951).

[60] SAIRR, *South Africa Survey 1999/00*, p. 164.

[61] See Ramcharan, in *Netherlands International Law Review*, Vol. XXX, 1983/3, p. 301.

[62] Fawcett, 1969, p. 31.

> The right to life has often been too narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner and the protection of this right requires that States adopt positive measures. In this connexion the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[63]

If this view is accepted, it follows that the right to health care is intimately linked to the right to life. And, as the United Nations General Assembly resolved, the enjoyment of all other rights is contingent on the right to life, at least in the sense that when one is dead the question of all other human rights for that person disappears with that. From this angle too, therefore, one might have expected the SAHRC to deal more meaningfully with the healthcare data that it had before it.

The national health budget for the period studied by the SAHRC was R23,2b (see Tables 2 & 4). Table 5 suggests that the national health budget, expressed in absolute figures, increased from R15b in 1995/96 to R17b in (1996/97) and R20b in 1997/98. Expressed as a percentage of the national budget, it stood at 10% in 1995/96; 9,8% in 1996/97; 11% in 1997/98 and 12,2% in 1998/99.

Consequently, in the period 1995-1999, in nominal terms, state expenditure represented a retrogressive measure insofar as the right of access to health care is concerned once only — i.e. in 1996/97 — whereas, expressed as a percentage of the budget, it dropped from 10% to 9,8%. It is noteworthy that in 1999/00 the national health budget increased to R24b (11,1%) and, therefore, another retrogressive measure, expressed as a percentage of the budget.

Holistically viewed, however, the national health budget in the period under consideration is encouraging since, when viewed against the inflation rate in that period, it represents a positive growth in each one of the financial years.[64] It accordingly seems to me, therefore, that, from the standpoint of the national budget, the state has dealt with health better than it has dealt with housing in the period under review. It is also heartening that in the financial year 2000/01 the budgetary allocation for health is R25,5b, which represents

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[63] Ramcharan, *supra*, p. 301.

[64] According to the SAIRR, *Budget 2000 — and Beyond*, in "Fast facts" p. 3, the inflation rate for 1995, 1996, 1997, 1998 and 1999 was, respectively, 8,7%; 7,4%; 8,6%; 6,9%; and 5,2%. A little bit of arithmetic would show that the budget increases on health are more than the adjustment that would have to be made if one took into account inflation. But of course there are other variables, e.g. increase in pressure on the health budget, which might change the picture.

13,8% of the national budget.[65]

Having said that, however, it remains necessary to inquire into the state of health in South Africa and whether, therefore, though positive, the national budget is adequate to meet the challenges at hand.

Table 9: Notifiable Diseases in SA by Province: 1997 & 1998

Province	Malaria		Measles		Meningococcal infection		Tetanus		Tuberculosis		Typhoid		Viral Hepatitis	
	97	98	97	98	97	98	97	98	97	98	97	98	97	98
E. Cape	4	7	50	82	15	12	5	2	9 367	13 124	166	173	74	60
F/State	46	27	80	98	3	0	1	0	6 210	6 692	3	1	72	40
Gauteng	556	214	163	114	68	21	2	1	9 061	9 410	24	10	296	240
KZN	11 425	13 352	213	102	16	28	1	2	10 075	9 672	49	35	96	205
M/Langa	5 708	5 852	57	79	8	3	2	2	2 347	3 098	71	44	52	50
N/West	329	194	56	25	1	0	2	1	6 733	5 576	8	0	14	18
N/Cape	15	8	10	11	4	16	0	1	2 362	2 587	0	3	20	28
N/Province	4 814	3 413	164	198	0	0	3	4	1 947	2 112	98	92	109	141
W/Cape	53	29	221	95	214	139	0	0	15 034	18 964	6	10	309	322
Outside[66]	146	396	0	0	0	1	0	0	28	68	0	3	0	2
Total	**23 096**	**23 492**	**1 014**	**804**	**329**	**220**	**16**	**13**	**63 164**	**71 303**	**425**	**371**	**1 042**	**1 106**

Source: SAIRR, 1999/2000, *South Africa Survey*, p. 211.

Table 9 is an indication of only seven out of the 33 notifiable diseases in South Africa. The table suggests that some cases are on the decline, whereas others are on the increase. It is particularly worrisome that South Africa should have experienced such a substantial increase of malaria and tuberculosis cases. The SAIRR records that in 1998 a total of 2 741 people died of tuberculosis in South Africa, which represented an increase of 40% in comparison with the figure for the previous year, and a total of 169 people died of malaria in South Africa in 1998, representing a 101% increase on the 1997 figure.[67]

South Africa is sufficiently advanced to entitle one to expect that diseases like malaria and tuberculosis would not be killing so many people and that, to the extent that such deaths occur, they would be on a downward swing. It thus becomes a pertinent question as to why a country as advanced as South Africa would show an increase in these deaths despite the constitutional promise of health care services. The easy answer to the question is that South

[65] See Fair Share, *2000/01 National Budget Handbook*, p. 7.

[66] Source of infection outside SA.

[67] SAIRR, *supra*, pp. 211 and 213 respectively.

Africa is at once a developed and a developing country. This view will, indeed, be supported by an examination of the incidence of these diseases by population group.

Table 10: Tuberculosis Notification Rate per 100 000 of the Population

Year	African	Coloured	Indian	White
1970	361	330	152	22
1975	312	322	79	19
1980	216	335	89	13
1985	185	429	84	15
1990	213	609	61	17
1991	191	652	57	15
1992	198	662	55	19
1993	207	713	51	19
1994	199	739	45	17
1995	179	671	69	16

Source: SAIRR, 2000, p. 216.

Table 10 suggests that the incidence of tuberculosis in the period studied by the SAIRR has been highest in the coloured and African communities and lowest in the white and Indian communities. In general terms the African and the coloured communities have traditionally been on the lower rungs of the economic scale in South Africa. Although it is baffling why the coloured community had a higher incidence of tuberculosis than the African community from 1975 onwards, it is however understandable on the two-world thesis why the two communities were worse afflicted than the white and Indian communities.

I contend, however, as I have already suggested, that the two-world thesis is an easy explanation of the problem. The health rights clause of our constitution was written against the background, precisely, that there were two worlds in South Africa, one rich and the other poor. If we suppose that the incidence of tuberculosis and malaria deaths in 1998 was attributable to this fact then, I contend, that is precisely what needs to be explained. How is it that, four years after the constitutional promise of better health, tuberculosis fatalities increase by a whole 40% whilst malaria fatalities more than double?

This fact, I suggest, raises the question whether our resources are adequate to meet our health problems. I refer both to primary health care resources and curative resources. The SAIRR found that between 1992 and 1997, a total of 2 388 nurses had completed primary health care training in South Africa, and that their training did not properly equip them to deliver primary health care services.[68] Note may be taken of the fact that, at the end of 1997,

[68] SAIRR, *supra*, p. 235. The figures did not include the Free State and the Northern Cape. If one proceeds on the basis that the average would have been approximately 341 per province, one might liberally project that,

there were some 175 599 registered nurses in South Africa.[69] It is in my view regrettable that the SAIRR does not state in what respects the training of these nurses was inadequate, but there can be no question about their sheer number being totally inadequate.

The ratio of medical doctors to the population also calls for examination if one is to make sense of the health care situation in the country. In 1998 South Africa had some 7 206 medical doctors.[70] That means there was one doctor for every 5 551 people. The Ministry of Health under Nkosazana Zuma recognised this as being inadequate and therefore embarked on a drive to bring in foreign doctors. By 1998 a total of 1 666 foreign doctors had successfully been attracted to work in South Africa.[71] That means a total of 8 872 doctors and therefore one doctor for every 4 509 people. That this was still inadequate can be gleaned from the fact that Zuma found it necessary to compel new doctors to do community service.

In 1998 there were some 360 public hospitals and 344 private hospitals in South Africa.[72] Unfortunately most of the public hospitals did not indicate the number of beds they had. Therefore it is not possible to analyse the adequacy of such facilities. However it is common knowledge that the situation is far from satisfactory and that overcrowding is a perennial problem at public hospitals. It is also common knowledge that private hospitals are generally inaccessible to a huge majority of South Africans. Therefore it would not be unfair to assert that such health facilities as we have in South Africa are not enough to deal with the health situation in the country.

It is not clear how many public clinics there are in South Africa, but figures cited by the SAIRR seem to bring them close to the order of 3 257.[73] Many of these clinics are under-resourced and do not function optimally.

When one considers all these facts, together with the fact that consideration was not given to a majority of diseases that plague South Africa and especially HIV/AIDS, it would not be unfair to assert that a lot of improvement is still necessary in respect of health care rights. Therefore, the SAHRC could have been more rigorous in its analysis of the data having a bearing on the right.

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had the two provinces been included, the figure might be 3 070. I suggest that this would not make any substantial difference.

69 SAIRR, *supra*, pp. 227 & 230.

70 SAIRR, *supra*, p. 228.

71 SAIRR, *supra*, p. 228.

72 SAIRR, *supra*, pp. 231 and 234 respectively.

73 SAIRR, *supra*, p. 234.

5.2.3 Food

The SAHRC identifies the departments of Agriculture, Finance, Welfare and Health as the national departments primarily responsible for implementing the right to food. The Department of Agriculture's report was however not available at the time when the Commission undertook the study. The SAHRC received the said report in August 1998.[74]

The Commission did not ask for reports relating to food from the departments of Health, Welfare and Finance.[75] Therefore the Commission makes no report on food at the national level, although it did receive data on food from the Department of Correctional Services. It further attributes its inability to report on the subject to the fact that "government departments did not respond to the specific questions asked in the protocols".[76]

5.2.3.1 A Critique

I have indicated under Section 4.2.1 hereof that the data on which the SAHRC report is based were collected from government between December 1997 and February 1998. Therefore it is correct that the submission of its report in August 1998 by the Department of Agriculture was long the deadline set for returning the protocols to the Commission. The degree of lateness on the Department's part in submitting its report to the SAHRC is in reason unconscionable.

But was the Commission justified in therefore not analysing the data submitted late and in not including it in its report? In its *Fourth Annual Report*, the Commission states that it released its *First Annual Socio-Economic Rights Report* in March 1999.[77] Therefore there were at least six months between the submission of its report by the Department of Agriculture and the release of its report by the SAHRC. Without making light of the Department of Agriculture's unconscionable conduct, it nevertheless seems that the Commission had sufficient time to analyse the report and factor it into its own. This is especially so if one considers that this was the first time in South Africa that government departments were required to give such reports. Therefore mishaps were bound to occur. It would have been an entirely different situation if the Department of Agriculture had tabled its report at a time when the Commission had almost completed its analysis and was finalising its report. But not even the Commission itself says that was the case.

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[74] SAHRC, 1998, Vol. IV, p. 21.

[75] SAHRC, 1998, Vol. IV, p. 21.

[76] SAHRC, 1998, Vol. IV, pp. 21-22.

[77] SAHRC, *Fourth Annual Report*, December 1998-December 1999, p. 55.

In discussing the health report of the SAHRC reference was made to the fact that the right to life is foundational in the sense that all other human rights disappear when one dies. Reference was also made to the fact that one's state of health has a direct bearing on one's right to life. Food, and therefore the right to it, has a direct bearing on one's state of health and therefore on his/her right to life.[78] Further, it was suggested in Chapter 3 that not only is the right to life precarious without food, but that human dignity disappears instantly. Thus the World Food Conference, convened under the auspices of the General Assembly of the United Nations on 16 November 1974, adopted the Universal Declaration on the Eradication of Hunger and Malnutrition.

Article 1 of the Declaration states that every man, woman and child has the inalienable right to be free from hunger and malnutrition. Article 2 proclaims that it is the fundamental responsibility of all governments to work together for higher food production and a more equitable and efficient distribution thereof between and within countries. Article 4 requires every state to remove the obstacles to food production and to provide proper incentives to agricultural producers. Article 11 requires all states to strive to readjust their agricultural policies so that they prioritise food production.[79]

The right to food is therefore very important and it is extremely unfortunate that the Commission did not deal with it in its report.

Section 27(2) of the constitution requires the state to take reasonable legislative and other measures, within its available resources, towards the progressive realisation of the right of access to food. Section 7(2) requires the state, among other things, to *fulfil* the right of access to food. In Section 5.2.1.1.5 hereof it was pointed out that the duty to fulfil a right requires that the state should take the necessary measures to ensure the satisfaction of the needs in respect of people who cannot satisfy those needs out of their own efforts. In Section 5.2.1.1.6 hereof it was pointed out that the duty to bring about the *progressive* realisation of a right means, among other things, that the state must not introduce retrogressive measures in respect of the right. How do we assess the state's performance in view of these injunctions?

The national budget for agriculture in 1997/98 was R1,0b.[80] In 1998/99 it was reduced to R718,8m, and in 1999/00 it was further reduced to R637m. Therefore the state did introduce retrogressive measures in respect of the right of access to food. There is in my view

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[78] See *Article 11* of the ICESCR; Craven, *supra* ("The Right to an Adequate Standard of Living"), pp. 307-308; Ramcharan, *supra*, pp. 305-307.

[79] See Tomasevski, 1987, pp. 5-7.

no reason for supposing that the retrogressive measures in respect of the right of access to food can be justified any more than those in respect of the right of access to adequate housing. Therefore, in my view, the state has baulked at the obligation to bring about the progressive realisation of the right of access to food in the period under review.

What about the duty to fulfil the right? An examination of the income patterns in South Africa in 1998 would be useful for scrutinising the state's performance in respect of its duty to fulfil the right of access in the period under review.

Table 11: Monthly Household Income by Population Group: 1998

Income Group/Month	Total population	African	Coloured, Indian, White[81]	White
	Percentage			
R1-R499	19,0	26,3	1,9	0,7
R500-R899	17,6	23,3	4,2	1,4
R900-R1 399	16,4	20,7	6,4	2,8
R1 400-R2 499	14,7	16,2	11,1	6,5
R2 500-R3 999	9,3	7,1	14,7	12,1
R4 000-R5 999	7,1	3,5	15,6	15,6
R6 000-R9 999	8,6	2,4	23,4	29,1
R10 000+	7,2	0,7	22,7	31,7

Source: SAIRR, 2000, p. 296.

Table 11 suggests that in 1998 some 36,6% of South African households lived on a monthly income of less than R900 whilst 53% lived on a monthly income of less than R1 400. It is against this background that the Southern African Catholic Bishops' Conference stated that 53% of South Africans live in poverty, and issued a pastoral statement under the title, *Economic Justice in South Africa*, in 1999.

The point at which one fixes the poverty line will always be a question for lively debate. The 14,7% households living on a monthly income of between R1400 and R2499 should arguably not fall through the poverty sieve. However a sizeable proportion of them probably live in conditions of poverty now.

It is noteworthy that the SAIRR refers to the income reflected in Table 11 as *claimed* income. Therefore, it seems to me, there is a subtle suggestion that the data might not be a reflection of the true state of affairs. What does one make of this? In doing social research through interviews, virtually every response one gets can be considered to be a claim.

[80] Fair Share, *Summary of National Budget Expenditures: 1997/98 and 1998/99*, p. 5. Fair Share states the agriculture budget as R726,9m for 1998/99.

Therefore there is a sense in which it is superfluous to label the responses one gets as claims. And it does not make sense to conduct interviews if one is going to take that kind of attitude to the responses one gets. In any event if one chooses to label some responses and not others as claims, then one has to justify that discrimination. The SAIRR provides no justification for selecting this datum for the label and not the other data it has worked with.

However a critique of the SAIRR's attitude to the data does not make the data reliable. Therefore it remains possible to agree with the critique, but still wonder: Are the data reliable? It is generally recognised that the responses one gets in conducting interviews might not reflect the true state of affairs. But one can only work with the responses one gets.[82] However the responses can be checked against other studies on the same subject. In this regard reference can be made to a SANGOCO study[83] whose figures are very close to those cited by the SAIRR. Further, the unemployment figures cited by the SAIRR do not undermine the thesis that a sizeable majority of South Africans lived in poverty in 1998. The SAIRR records that in 1997 the unemployment rate in South Africa was 26,9%, using the *strict definition* of unemployment, and 49,5%, using the *expanded definition*.[84]

Now, the strict definition only counts as unemployed those people who have not worked during the seven days preceding the interview; who are available to take up employment within seven days of the interview; and who have taken steps to look for employment in the four weeks preceding the interview. The expanded definition, on the other hand, does not require that the person must have sought employment.[85]

For current purposes I would argue that it really does not matter that a person has been unemployed for more than seven days prior to the interview: the person is simply not in a job. By a parity of reasoning, the fact that an unemployed person did not actively look for employment in the four weeks prior to the interview does not change the reality that he/she is not having a job. Therefore the unofficial, and therefore probably truer, unemployment rate was likely to be higher than 49,5% in 1998.

Consequently it seems to me that the thesis that a sizeable majority of South Africans lived in poverty in 1998 must survive the subtle cynicism of the SAIRR. If we read the statistics on unemployment together with the fact that many of those who do have

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[81] The SAIRR explains that the individual groups were too small to record. Therefore they are combined in this manner.

[82] See McNeill, *supra*, p. 13.

[83] *NGO Matters*, 1997, 2(9), August.

[84] SAIRR, *supra*, pp. 306 and 307.

employment earned a pittance, the inference of poverty for a sizeable majority seems to me obviously inescapable.

What is the relevance of this inference for the critique of the SAHRC's report? The question I am trying to answer is whether the state has complied with its obligation to fulfil the right of access to sufficient food in the period under review. The fact that there are so many people who were unemployed and so many who earned a pittance raises the question whether they would have been able to satisfy their needs out of their own efforts in respect of the right.

I have already indicated that government reduced state expenditure on this right in the relevant period. In view of the levels of poverty referred to above, such a reduction is hard to justify. What is even more disturbing is the knowledge that the Department of Welfare, one of the departments in which the implementation of this right resides, spent less than 1% of its budgeted funds on poverty relief in the 1998/99 financial year.[86] Therefore it seems clear that the state failed in this obligation.

5.2.4 Water

The SAHRC deals with the right of access to sufficient water under the three spheres of government, viz. national, provincial and local. The relevant national department is Water Affairs and Forestry.

5.2.4.1 National Department of Water Affairs and Forestry

The Commission finds that the Department's understanding of its obligations under the right is excellent both in terms of the constitution and international jurisprudence. The obligation is to "create an enabling environment" through which everyone can have access to water and sanitation services and to support people in gaining access to these services.[87] The Department defines the "sufficiency" of water in terms of the water's capacity to support human life and personal hygiene. It derives its notions on the quantity of the basic minimum that must be supplied to everyone from the World Health Organisation's guidelines. The medium and long-term goals with regard to water provision are similarly derived. The water legislation and policy documents take cognisance of questions relating to the quality,

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[85] SAIRR, *supra*, pp. 299 and 300.

[86] See *Evening Post*, 19 April 2000.

[87] SAHRC, 1998, Vol. IV, p. 22.

availability, assurance of supply, upgradability of services, equitable access, sustainable management and use, and cultural and social appropriateness.[88]

5.2.4.2 Provincial Governments

The SAHRC notes that the Eastern Cape, Northern Province and North West did not respond to the protocol on water. The six provinces that responded did not provide sufficient details on their understanding of their obligations in terms of the right. Such information as they provided was fragmented and did not reveal a coherent description of what each provincial government saw as its specific role and function in bringing about the realisation of the right. It was also difficult to work out which department bears primary responsibility for water at the provincial level. Most provincial governments understood the "sufficiency" of water exactly as the National Department of Water Affairs and Forestry.[89]

5.2.4.3 Local Governments

The GJMC, as pointed out previously, is the only local government that responded to the SAHRC's protocols. Its understanding of the right of access to water was that water must be supplied to paying consumers. However it has a policy to cover the provision of water to the indigent. The provisions of this policy are not outlined or analysed in the SAHRC report.[90]

5.2.4.4 A Critique

The Commission deals more meaningfully with this right than it has with the other rights previously discussed. It notes, for instance, that an assessment of any progress made in the realisation of the right requires a concrete analysis of the existing situation.[91] Thus it does not content itself with a statement of what laws and policies exist in respect of the right, but also inquires into whether those laws and policies have actually translated to the concrete realisation of the right. The Commission then refers to statistics supplied by the Minister of Water Affairs and Forestry, which suggest that:

- More than 12m people are without access to potable water; and
- Over 20m people are without adequate sanitation.[92]

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[88] SAHRC, 1998, Vol. IV, pp. 22-23.

[89] SAHRC, 1998, Vol. IV, pp. 24-25.

[90] SAHRC, 1998, Vol. IV, pp. 25-26.

[91] SAHRC, 1998, Vol. IV, p. 26.

[92] SAHRC, 1998, Vol. IV, p. 26.

Although the Commission takes a positive step in reaching beyond the law and raising questions of fact, it does not go far enough. It cites the statistics referred to above and others, but does not carry the analysis any further. What does it mean, for instance, that there are over 12 million people without potable water and over 20 million without adequate sanitation? Do these figures indicate progress in the endeavour to realise the right of access to sufficient water? If so, is the pace of the progress sufficient? The Commission asks none of those questions. Therefore we have to construct that picture ourselves.

Table 12: People Provided with Water by Province: March 1994-March 1999

Province	Number	Proportion of Total %
Eastern Cape	1 210 229	34
Free State	193 686	6
KwaZulu-Natal	435 643	12
Mpumalanga	480 933	14
North West	437 572	12
Northern Cape	24 932	1
Northern Province	619 775	18
Western Cape	121 607	3
Total	**3 324 447**	**100**

Source: SAIRR, 2000, p. 160.

There being no indication to the contrary, we must suppose that the statistics from the Minister of Water Affairs and Forestry, cited by the SAHRC, were provided in the first two months of 1998. Now, it is noteworthy that the SAIRR relied on figures from the Department of Water Affairs and Forestry for the data reflected in Table 12. It is further noteworthy that the table refers to people who were provided with water in the stated period. Therefore we can extrapolate that of the 12 million people the Minister had identified to be without safe and potable water in South Africa at the beginning of 1998, 8 675 553 (72,3%) remained without safe and potable water more than one fiscal year thereafter.

The SAIRR paints an even less lustrous picture in asserting that according to the Water Affairs and Forestry Minister 12 million people remained without water after the 3.5 million referred to in the table were provided with it.[93] The fact that the Department would have cited the same figure (to the SAHRC) a year or so previously, raises reservations about its co-ordination of its own information. It is possible, however, that the confusion arose partly from the change in personnel. The SAHRC, for instance, cites Minister Kader Asmal,

[93] SAIRR, *supra*, p. 160. See SAIRR's endnote no 40 on page 179 of its report, according to which the Department released the figures in issue on 16 April 1999.

whereas the SAIRR cites Minister Ronnie Kasrils. But the SAIRR writes later that Kasrils stated in August 1999 that his Department had reduced the backlog to 7,5 million which reduces the margin of discrepancy appreciably. However I do not think anything will be gained by making too much of an issue about this since, whichever way one looks at it, the conclusion must be that a substantial number of people in South Africa still lacks access to safe water.

What about the 20 million who were without adequate sanitation? The last figures on sanitation facilities in South Africa were released in 1996. Adequate sanitation, however, is closely tied up with the availability of running water. This is borne out by the fact that sanitation is included in the national water budget (see Table 2). Therefore it is safe to suppose that, from the figures on water delivery, more than a substantial number of the 20 million identified by Asmal as lacking adequate sanitation in 1998 would be in the same position still.

The national budget for water in 1997/98 was R2,9b (see Table 2). In the previous year it had been R2,4b.[94] The 1997/98 budget represented an increase of 17,2% over the previous year's water budget before taking inflation into account. But even after taking inflation into account the 1997/1998 water budget still represented a real increase, keeping in mind the inflation rates mentioned in footnote 64 of Chapter 5. Therefore in the period studied by the SAHRC the state did not introduce retrogressive measures from the standpoint of the budget insofar as the right of access to sufficient water is concerned.

But for the year 1999/00 the funds allocated to water were reduced to R2,5b (Table 2). Fair Share estimates that this represented a negative (real) increase of 19,9%.[95] In this period the state, then, introduced a retrogressive budgetary measure in respect of the right of access to sufficient water. As I have already argued, the measure would be hard to justify.

A point to bear in mind in assessing the adequacy of the water budget in any given year during the period under review is that the budget must also cater for forestry.

5.2.5 Social Security

The SAHRC discusses the right of access to social security in terms of two government spheres, namely national and provincial/local. The national department responsible for the implementation of this right is National Welfare.

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[94] Fair Share, *Key Elements of the 1997/98 Budget*, p. 2.

[95] Fair Share, *Summary of National Budget Expenditures: 1998/99 and 1999/00.*

5.2.5.1 National Department of Welfare

The policy document discussed by the Commission with reference to the Department is the *White Paper for Social Welfare*. The White Paper endorses the provision of comprehensive social assistance to those without means of support. It commits the state to build a comprehensive, integrated social system in order to ensure the realisation of the right of access to social security. The White Paper envisages a social security system that will ensure "universal access" to a "minimum income sufficient to meet basic subsistence needs" and that will "work inter-sectorally to alleviate poverty". The White Paper enshrines a rights-based approach to social security; equity, non-discrimination, participatory democracy; improved quality of life; transparency and accountability; accessibility; and appropriateness. The White Paper also seeks to ensure that every member of society who is in need of care will have access to support, social welfare services and social security benefits in an enabling environment.[96] The SAHRC pronounces the White Paper to be in line with international trends and standards.

The Commission further refers to the *Social Assistance Act* and regulations framed thereunder without indicating what the provisions of the Act or the regulations are. But it does indicate that the Department's understanding of "appropriate social assistance" is that the assistance must be based on particular circumstances and in keeping with the Act. Quite naturally, then, the SAHRC does not evaluate the adequacy of the Act. However it encourages the Department to "evaluate the adequacy of the existing legislative criteria governing access to social security".

The Commission finds that the Department fails to provide analytical data on the number of poor people in South Africa who need assistance and that it has no standards on who should qualify for assistance and whether the social benefits are adequate.[97]

5.2.5.2 Provincial and Local Governments

The Commission states that most social welfare departments of provincial governments that responded to the protocol had a fair general understanding of the constitutional provisions relating to social security. The GJMC did not provide a coherent account of its understanding of its obligations under the right.

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[96] SAHRC, 1998, Vol. IV, pp. 32-33.

[97] SAHRC, 1998, Vol. IV, p. 34.

5.2.5.3 A Critique

The Department clearly has sound and lofty policies in place, and the Commission did a good job of flashing them out. The Commission's failure to evaluate the adequacy of the legislation in place for delivering social security, however, boggles the mind. What boggles the mind even more is its advice to the Department that it (the Department) must evaluate those laws. The constitution has created the Commission exactly, among other things, so that it should evaluate such laws and report to parliament about how they facilitate or hamper the delivery of the contents of socio-economic rights.

The Commission once again correctly raises factual questions in respect of the realisation of the right, but does not take the matter any further. If it had, the Department would have been the wiser for it and its scandalous failure to use 99% of the funds budgeted for poverty relief might have been nipped in the bud. The fact that the Department has put in place such sound and lofty policies, and then does the diametric opposite of what those policies require, vindicates the argument by Opsahl, referred to earlier, that it is not enough to report on laws and constitutions only.

With reference to projected public expenditure on social security, Tables 2 and 5 should be consulted. The social welfare budget in 1997/98 was R18b. It made up 10% of the national budget and represented a 22,2% increase over the previous year's welfare budget. Therefore in the period studied by the SAHRC the government did not introduce retrogressive budgetary measures in respect of social security. In fact, expressed in absolute figures, the government has introduced no retrogressive budgetary measure in respect of social security right through to the 2000/01 fiscal year.[98] Expressed as a percentage of the total budget, projected public expenditure on social security shrunk from 10,5% in 1995/96 to 7,6% in 1996/97; increased to 10% in 1997/98; shrunk to 9,7% in 1998/99; to 9,1% in 1999/00 and then to 9% in 2000/01. The result is that, overall, the 2000/01 social welfare budget represents a (real) negative increase of 1,5%.[99] Viewed over a longer period, therefore, and taking inflation into account, the government *has* introduced a retrogressive budgetary measure in respect of social security.

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[98] The social welfare budgets for the relevant years were R19,3b (98/99); R19,8b (99/00) and R23,3b (00/01).

[99] Fair Share, *2000/01 National Budget Handbook*, p. 4.

Table 13: Monies Lost by Department of Social Welfare between 1996 & 1998

Province	Period	Amount Lost	Source of Loss
Eastern Cape	1996-97	R5 390 000	Unspecified
Eastern Cape	1996-97	R610 000	Robbery During Transit
Free State	1996-98	R1 073 000	Unspecified
Free State	1996-98	R927 000	Robbery During Transit
Gauteng	1996-98	R422 559	Theft
Mpumalanga	1997-98	R165 000	Theft
North West	1996-98	R3 200 000	Theft
Northern Cape	1997-98	R965 015	Theft
Western Cape	1996-98	R2 600 000	Robbery During Transit
Western Cape	1996-98	R200 000	Theft from Post Office
Total		**R15 552 574**[100]	

Source: SAIRR, 2000, p. 238.

Crime has also had its fair share in undermining the fulfilment of the right of access to social security.

5.2.6 Education

The Commission discusses the right to education under two national departments and under provincial/local governments. However nothing is said about local governments. The two national departments are National Education and Training and Correctional Services.

5.2.6.1 Department of National Education and Training

The SAHRC notes that the Department has a clear understanding of its obligations in terms of the right to education, as well as a clear interpretation of the terms "basic education" and "adult basic education". However the Commission does not say what those clear understandings and interpretations are. It notes further that the Department appreciates the difficulties of changing [the] education [system] overnight.

The Commission expresses reservations about the Department's failure to indicate that undue delay would be intolerable. Similarly, the Commission is critical of the department's ruling on when it would be reasonably practicable to offer education in a particular language. It seems from the criticism of the Commission that the Department's policy on the matter is

[100] According to the SAIRR the total mentioned by the Minister is in the order of R20m. The total indicated in the table is the sum of the provincial breakdowns as they are stated by the SAIRR. The discrepancy between the figure of R20m and the table total seems to arise from what appears to be an error of calculation on the part of the SAIRR. It would seem the Institute has added the totals mentioned in respect of provinces to their breakdown. So, where the Eastern Cape lost R6m, of which R610 000 was attributed to robbery in transit, the SAIRR seems to have added the two figures. So calculated, the total becomes R19 925 574, and therefore very close to the SAIRR's R20m.

that there must at least be 40 learners in a class requesting to be taught in that language. The SAHRC argues, I think correctly, that the ruling is onerous and that it would be better to stipulate a percentage.

The Commission refers to statutes that were cited by the Department in its response. The statutes are the *National Education Policy Act*, the *South African Schools Act*, and the *Higher Education Act*. It notes that these statutes were cited as measures for protecting people from discrimination in private educational institutions and from other practices in the private sector that might impact on the right to education negatively. It judges the Department's understanding of its obligations under the right to be in line with international norms and the constitution. The Commission similarly adjudges the Department's definition of "inferior standards", although it does not say what that definition is.[101]

5.2.6.2 Department of Correctional Services

The Commission notes that the Department of Correctional Services did not say anything about its understanding of its obligations with reference to reading materials for prisoners.[102] Nor did it give any information about facilities it has to enable inmates to study courses that are approved, or of the numbers of inmates who use such facilities as may exist.[103] Further, the Department makes no reference to any plan for the realisation of the right to reading materials of detained persons.[104]

5.2.6.3 Provincial and Local Governments

Of the five provinces[105] that responded to the questionnaire none provided adequate information on their understanding of their obligations under the right. The Free State Education Department had taken steps to make education compulsory for all learners under the age of 15 years and to criminalise non-compliance.[106] The Commission finds that, with the exception of the Free State and Mpumalanga, no coherent plan of action for the realisation of the right to education emerges from the data submitted by provincial

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[101] SAHRC, 1998, Vol. IV, p. 38.

[102] SAHRC, 1998, Vol. IV, p. 39.

[103] SAHRC, 1998, Vol. IV, p. 40.

[104] SAHRC, 1998, Vol. IV, p. 42.

[105] Free State, Gauteng, KwaZulu-Natal, Mpumalanga and Northern Cape.

[106] SAHRC, 1998, Vol. IV, p. 39.

governments.[107] However the Commission does not say what those action plans are in the two provinces.

5.2.6.4 A Critique

Although the Department refers to things that should be changed in the education system, there is no indication of what those things are and what should be put in their place. Nor is there an indication of any time frames the Department has set for itself to change whatever it is that must be changed or, indeed, of the progress it has made so far. I suggest that this is a weakness in that it is therefore not possible to evaluate what the Department is saying. If it is not clear what it is government wants to change in the education system and what it wants to put in its place, any talk about change is meaningless.

Further, to protest that change cannot take place overnight is to state the obvious. What would be more meaningful would be to specify the changes that the Department wants to bring about and the timeframes within which they are envisaged.

Once again the Commission lists statutes that have been introduced without stating their provisions and analysing their reasonableness and adequacy for the fulfilment of the right. It also fails once more to inquire into the facts in order to see whether any progress is made in the realisation of the right and whether, if so, the progress is reasonable. This latter inquiry would have been all the more interesting because, unlike the five rights previously discussed, the constitution does not make the state's obligation to fulfil this right contingent upon its available resources. It simply instructs the state to take reasonable measures to ensure that education is progressively available and accessible.

Table 5 indicates that in the period under review, state expenditure on education has increased consistently, expressed in absolute figures. Therefore, stated as absolute figures, the state has not introduced any retrogressive budgetary measure in this period insofar as the right to education is concerned. Table 5 also suggests, however, that as a percentage of the budget, projected education expenditure declined in the financial year 1996/97 and rose again in the subsequent financial years. Over the entire period under review, the overall percentage increase is 0,6% and thus barely significant, if it is accepted, as proposed earlier, that an increase of 0,5% and below is insignificant (see footnote 38, Chapter 5).

If, now, it is accepted that the increase in public expenditure on education is insignificant over the period under review, it seems to follow that state expenditure on

[107] SAHRC, 1998, Vol. IV, p. 42.

education is not adequate for the realisation of the right to education. However there is a more direct way of approaching the question.

Table 14: Education Levels of People of 20 years and above by Province: 1996

Province	No Schooling	Some Primary	Some Secondary	Std 10	Higher	Unspeci-fied/Other	Total
E. Cape	617 796	899 711	966 341	328 637	139 200	88 987	**3 040 672**
F. State	236 148	458 384	493 148	199 654	76 265	49 453	**1 513 052**
Gauteng	419 157	812 267	1 780 368	1 042 744	369 672	402 764	**4 826 928**
KZN	957 217	1 026 021	1 328 708	665 303	200 819	217 428	**4 395 496**
M. langa	410 337	307 000	403 474	203 102	69 551	58 967	**1 452 430**
N. West	403 143	503 301	560 987	236 188	75 258	61 774	**1 840 651**
N. Cape	97 692	134 149	139 233	53 482	25 939	18 027	**468 521**
N. Province	771 587	376 663	556 667	293 703	94 107	95 312	**2 188 040**
W. Cape	153 109	556 696	901 196	435 620	243 954	119 855	**2 420 430**
Total	**4 066 187**	**5 084 189**	**7 130 121**	**3 458 434**	**1 294 720**	**1 112 568**	**22 146 220**

Source: SAIRR, 2000, p. 110.[108]

Thus, at the beginning of the period in respect of which the SAHRC conducted the study, some 18,4% of what one might call South Africa's adult population had no education at all. On the other side of the spectrum, a mere 5,8% had post-matriculation education. It is evident from this that a lot of effort and money had to be invested in adult basic education as well as further education in order to bring about the realisation of the constitutional promise. How, then, does public expenditure in the period under consideration match up to this task?

Fair Share suggests that the 1997/98 education budget translates to annual public expenditure of R0,31 per illiterate person in the country and R9 400 per tertiary student.[109] It seems quite clear that thirty-one cents per illiterate person per annum would be inadequate even if South Africa did not have the high illiteracy levels that it has. Fair Share writes that the entire training of a medical doctor in South Africa in the period under consideration cost R750 000[110] and therefore, over seven years, approximately R107 143 per annum. R9 400 per annum represents a mere 8,8% of what it cost to train a medical doctor per year. That also seems clearly inadequate.

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[108] The SAIRR notes that totals might not tally, although they should, due to rounding off.

[109] Fair Share, *Key Concerns About the 1997/98 Budget and the Macro-economic Plan (GEAR)*, p. A-3.

[110] *Ibid.*, p. A4.

Section 29(1)(b) of the constitution requires the state to make basic education, adult basic education and further education progressively available and accessible. Under Section 5.2.1.1.6 hereof I made reference to Craven where he argues that the obligation to bring about the progressive achievement of a right requires that the full realisation of that right be achieved as quickly as possible. It seems clear that the public expenditure referred to above cannot bring about the full realisation of the right to education as enshrined in the *Bill of Rights* as quickly as possible. And this is true even though, from the standpoint of the budget, the state cannot be seriously accused of having introduced retrogressive budgetary measures insofar as the right to education is concerned.

A further problem in this regard is that even if the state had invested all the funds at its disposal in education, it is by no means obvious that the full realisation of the right might be expedited. This seems clear from the fact that what resources the state has made available are not taken full advantage of.

Table 15: Candidates who wrote the Matriculation Examinations: 1996-1999[111]

Province	1996		1997		1998		1999	
	Wrote	**Passed**	**Wrote**	**Passed**	**Wrote**	**Passed**	**Wrote**	**Passed**
E. Cape	66 809	7 061	76 851	7 526	82 517	6 533	79 831	5 438
Free State	35 554	4 208	40 157	4 296	40 777	4 338	33 004	3 484
Gauteng	73 152	14 057	75 910	13 135	76 861	12 498	71 757	11 479
KZN	86 608	20 040	105 449	19 199	108 063	17 998	103 268	16 575
Mpumalanga	41 731	4 332	39 091	3 630	41 612	5 184	38 236	4 188
N. Cape	7 111	1 225	7 611	1 122	7 429	806	7 160	808
N. Province	126 081	9 351	128 559	7 266	114 621	7 780	104 200	7 861
N. West	46 349	7 611	48 542	5 336	42 436	5 691	39 819	4 702
W. Cape	34 830	12 130	37 063	8 617	38 546	9 028	37 199	9 090
Total	**518 225**	**80 015**	**559 233**	**70 127**	**552 862**	**69 856**	**511 474**	**63 725**

Source: Department of Education, *Report on the 1999 Senior Certificate Examinations*.

There was thus a 7,3% increase of candidates sitting for the matriculation examinations in 1997 over those who took the examinations in 1996. However candidates who took the examinations in 1998 dropped by 1,1% in comparison with those who took them in 1997. Candidates who took the examinations in 1999 dropped by 7,5% in comparison with those who wrote the matriculation examinations in 1998. Overall, the number of candidates sitting for the matriculation examinations dropped by 1,3% between 1996 and 1999. Table 14

suggests that only 15,6% of the adult population in South Africa had matriculation qualifications in 1996. The 1,3% reduction in the number of matriculation candidates between 1996 and 1999 means that we are moving backwards. It means that we are not increasing the ratio of people with matriculation qualifications in relation to the entire population.

Table 15 suggests that 15% of the candidates who took the matriculation examinations in 1996 obtained university entrance for purposes of a degree. In 1997 the percentage dropped to 12,5 and increased to 12,6 the following year. In 1999 it fell back to 12,5. Therefore, not only has the number of candidates taking the matriculation examinations declined in the period under consideration; those who pass the examinations are also on the decline. This seems to clearly militate against the realisation of the kind of society envisaged by the Bill of Rights in enshrining the right to education. It also quite clearly is out of line with South Africa's innovation policy, which promises a future where all South Africans will enjoy improved and sustained quality of life and share in a democratic culture.[112]

Peter Drucker gives us a glimpse of the conditions that must be fulfilled if the promise held out by the *White Paper on Science and Technology* must be realised. He writes:

> [The] great majority of the new jobs require qualifications the industrial worker does not possess and is poorly equipped to acquire. They require a great deal of formal education and the ability to acquire and apply theoretical and analytical knowledge. They require a different approach to work and a different mindset. Above all, they require a habit of continuous learning. Displaced industrial workers thus cannot simply move into knowledge work or services the way displaced farmers and domestic workers moved into industrial work ...[113]

Therefore it seems obvious that, for future South African generations to enjoy the kind of life held out by the *S&T White Paper* and by the Bill of Rights, they have to pay more serious attention to education now than they do. In Section 2.7 hereof I argued that rights create for their bearer obligations as well. I want to argue that the right to education creates an obligation not only for the state and teachers, but also for learners. To speak about the right to education in a situation where there is no effective learning seems to me a travesty of public

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[111] I count as passes only those candidates who gained university entrance qualifications for purposes of a degree.

[112] *White Paper on Science and Technology*, *supra*, p. 3.

[113] Drucker, 1994, p. 62. Indeed, this is also a view expressed in the S&T White Paper itself — see at p. 5.

funds. Therefore, in investing the taxpayer's money in education, it seems quite obvious that there is also a need to ensure that the money is well spent. Therefore learners must be made to appreciate the need to engage seriously with the learning materials available to them even if it means coercing them to do so. After all, an obligation means that if the person on whom it falls does not execute it volitionally, the necessary pressure will and must be brought to bear on him/her in order to ensure the execution of the obligation. It seems to me blatantly incongruous to demand of the state to make education resources available to the maximum of its abilities, if we are not also going to insists that those for whom they are meant must avail themselves of them to the maximum of their abilities!

5.2.7 Environment

The right that is protected here is the right to an environment that is not harmful to the health or wellbeing of people. The state is directed to introduce reasonable measures to prevent pollution and ecological degradation; to promote conservation and to secure ecologically sustainable development and use of natural resources.

The national department that bears responsibility in respect of this right is the National Department of Environmental Affairs and Tourism.

5.2.7.1 Department of Environmental Affairs and Tourism

The SAHRC notes that the Department understands its duty to respect environmental rights to include the development of mechanisms and exercising proper judgement in granting permits for development. The said mechanisms include policy and legal frameworks for the regulation of the conduct of public and private persons insofar as it may have a bearing on the right. However the Commission bemoans the failure of the Department to grasp that it also has a duty to take remedial action to rehabilitate a damaged environment. The SAHRC then cursorily alludes to "three major limitations" about the Department's report but does not really detail those limitations, save to state that they were referred to above. However, there are more than three limitations that the Commission has referred to, and it is by no means clear which are the major three.[114]

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[114] The Commission, for instance, decries the fact that the Department failed to take account of the additional requirements to "prevent" and to "secure" in addition to the duty to respect, protect, promote and fulfil the right — see *Economic & Social Rights Report*, Vol. IV, p. 43. Where the Department reports that in the previous regime black people tended to be located close to polluting and unhealthy areas which were also prone to floods, the Commission remonstrates that these phenomena should have been linked to specific categories such as "harmful to health and well-being" etc. — pp. 42-43. Where the Department reports about the rationalisation of laws and policies, the Commission notes that more information could have been

The SAHRC notes that the Department understands its duty to protect environmental rights to include the establishment and enforcement of adequate legal and regulatory frameworks in respect of the right. The Commission regrets the Department's failure to include environmental impact assessment in its report. However it pronounces the Department's report in respect of the duty to protect better than its report regarding the duty to respect the right.[115]

The Commission finds that the Department's understanding of its duty to promote and fulfil the right is satisfactory if somewhat narrow. It notes that the duty to promote and fulfil the right is connected to respecting and protecting the right, but does not say how.[116]

Reference is made to the budget figures provided by the Department but no effort is made to analyse them since "the information does not indicate where the rest of the DEAT's budgetary allocations are spent".[117]

In respect of the component "not harmful to health or well-being", the Commission finds the Department's report to be "precise but cryptic" in that the Department failed to explain the phrase.[118] The Commission finds no fault with the Department's conception of the term "sustainable" although it does not say what that conception is. It merely states that the Department "clearly recognises use and conservation of resources as well as the *intragenerational* and *intergenerational* concepts".[119] The Commission, however, does not find the department's articulation of "justifiable economic and social development" to be comprehensive and well thought out. It argues that the concept "development" is often misunderstood in South Africa in that any construction is taken to translate to development. The Commission thinks that the Department ought to have referred to the *Development Facilitation Act* in answering the protocol.[120]

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provided — p. 43. Where the Department furnishes information about pollution, waste disposal, purification and conservation, the SAHRC notes that the focus should have been on how rationalisation or lack of it impacted and continues to impact on the victims of discrimination — p. 43. I have already made reference to the SAHRC's bemoaning of the fact that the Department's understanding of its duty does not include the taking of restorative measures — p. 43. The SAHRC also refers to the fact that other departments administer a number of laws having a bearing on the environment and that there is no co-ordination — pp. 43-44. Finally, the SAHRC refers to the fact that there is no effective body regulating pollution in South Africa – p. 44.

[115] SAHRC, 1998, Vol. IV, p. 44.

[116] *Ibid.*, p. 45.

[117] *Ibid.*

[118] *Ibid.*

[119] *Ibid.*

[120] *Ibid.*, p. 46.

5.2.7.2 Provincial Governments

The Commission finds that the Free State's conception of the terms "respect", "protect", "promote" and "fulfil" is general and tends to their literal meaning. Further, the Commission finds, it is not clear what the structure of provincial government is and therefore where responsibility for environmental rights falls.[121]

The Commission is impressed with Gauteng's grasp of the constitutional text and judicial interpretations on socio-economic rights. However it does not indicate what this understanding is and it also finds that, like the Free State, it is not clear where primary responsibility for environmental rights rests in Gauteng.[122]

Because of its long coastal line, industrial centres and natural resources, the SAHRC opines that KwaZulu-Natal provides a context for different environmental challenges. However it does not say what those different challenges might be. KwaZulu-Natal, however, the Commission finds, shows a poor understanding of the key concepts, namely, "respect", "protect", "promote" and "fulfil".[123]

Mpumalanga has a department dedicated to environmental affairs and tourism. The Commission finds that its report is focused on environmental laws, policies and regulations and that it is therefore useful. The Commission finds that the Department "does not highlight Section 24" but deals with issues of education and then proceeds to focus on conservation and pollution control. Although the Commission finds Mpumalanga's report "promising" it does not say how the province dealt with the subject matter of the inquiry save to state that it focused on it.[124]

The Commission finds the Northern Cape's grasp of the key terms ("respect", "protect", "promote" and "fulfil") satisfactory, but its lack of focus on environmental rights worrisome. The Northern Cape also has a department dedicated to environmental affairs.[125] Although the Western Cape sent a response, there was nothing in it on environmental rights as required by the protocol.[126]

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[121] *Ibid.*, p. 48.

[122] *Ibid.*, p. 49.

[123] *Ibid.*

[124] *Ibid.*, pp. 49-50.

[125] *Ibid.*, p. 50.

[126] *Ibid.*

5.2.7.3 Local Government

Although the GJMC sent a response in which it reveals, as the Commission finds, a sound grasp of the "key terms", there is nothing in it on environmental rights.[127]

5.2.7.4 A Critique

As it was with other rights, the Commission's analysis of the data in respect of environmental rights suffers from its preoccupation with legalism. Even though it asks pertinent empirical questions on this right, the Commission makes no effort to deal with those pertinent empirical issues. So, for instance, it raises the question whether the relevant government department should not have done an environmental impact assessment of applicable laws and policies. On the face of the report, the Department did not. But even if it had, that would not absolve the Commission from its constitutional obligation to evaluate both the adequacy of applicable laws and policies in bringing to fruition the injunctions of the constitution and the validity of such assessment. The fact that part of the data before the Commission was that under apartheid rule there was a tendency to locate dumping cites next to black people increases the urgency that it should at least have made an effort to deal with the rather crucial question that it raises itself.

Similarly, the Commission raises the importance of considering budgetary allocations for the realisation of environmental rights but does not take the matter any further on the basis that the data before it do not indicate where the allocations are spent. That may well be so, but the budget itself stipulates where the allocations should be spent.[128] Therefore the Commission could have argued with the Department for not specifying the destination of the relevant allocations, but establish that destination itself and then inquire whether the allocations are adequate for the task at hand.

Table 2 indicates that in 1998/99 the environmental budget was R463m and constituted 0,23% of the national budget. It was increased to R632m in the following year (0,29% of the national budget). I have indicated at the beginning of this section that the right that is protected here is to have an environment that is not harmful to one's health and wellbeing. In Section 5.2.4.4 hereof I suggested that a substantial number of the 20m people identified by

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[127] *Ibid.*, p. 51.

[128] See, for example, *Estimate of Expenditure to be Defrayed from the National Revenue Fund*, Financial Year Ending 31 March 2000, pp. 11-17, which details the destination of various allocations of the environmental budget for the period 1998/99. The same information would have been reflected in the national budget for that period.

Kader Asmal as lacking adequate sanitation in 1998 would have been in pretty much the same position at the end of the period studied by the SAHRC. If one combines this with the data that under apartheid rule there was a tendency to locate dumping cites next to black residential areas, it seems clear that the public funds set aside to deal with environmental issues were not adequate for the task at hand at the relevant time. Nor were they adequate in the year after, as I have suggested in Section 5.2.1.1.6 hereof, since the budgetary increase over the previous cycle was barely significant and would in real terms have been a negative increase.

5.2.8 Department of Finance

The Commission discusses the Department of Finance's role in the implementation of socio-economic rights as an over-arching one, as one of facilitation, [129] since the responsibility to implement the rights rests with stated departments and spheres of government. Although that is so, the Commission nevertheless inquires into the Department's understanding of the "key terms" and is satisfied that the Department correctly understands those terms and does not take the inquiry much further. So it misses a golden opportunity to inquire into the budgetary allocations that it felt hamstrung by in examining the data emanating from the Department of Environmental Affairs and Tourism. It also misses the opportunity to inquire into the way in which the Department prioritises or fails to prioritise socio-economic rights in the budgeting process.

[129] SAHRC, 1998, Vol. IV, p. 52.

Chapter 6

Conclusion

In drawing the conclusions that I do, I am mindful of the fact that the SAHRC study under review was the first of its kind in South Africa and also a first for the Commission. Therefore we were all on a learning curve in many respects. So seen, one should perhaps be less critical and more supportive. However I propose, while recognising the good work of the Commission, to treat the Commission in the same way as I argue it should have treated the state. In other words, failure to offer legitimate criticism timeously might establish non-normal conduct and make it less easy to criticise it in future.

In Chapter 4 I have dealt with the methodological strengths and weaknesses of the SAHRC inquiry into the implementation of socio-economic rights. I reserved the question whether the evidence gathered supports the conclusions drawn to a stage when I would have dealt with the Commission's conclusions (see Section 4.3.2.4 hereof). A cursory glance at the contents of Chapter 5 would suggest that it is hard to pinpoint conclusions drawn by the Commission that might even remotely throw up the question of inferential validity. As I have pointed out repeatedly in dealing with the Commission's analysis of the data, the question that concerned it most was whether respondents to its protocols understood the meaning of the key terms — viz. "respect", "protect", "promote" and "fulfil".

At places the Commission concludes that respondents understood the terms and at others that they did not. Whatever its conclusions, the methodological question of inferential validity simply does not arise, since the respondents' understanding or misunderstanding of those terms has nothing to do with the methods used by the Commission to gather or analyse the data. But if that is so, the question as to the utility of the SAHRC study must arise. In other words, if the Commission does not draw any conclusions that can be tested in respect of validity, what was the cash value of the study?

I take the view that this is a major weakness of the SAHRC's inquiry, and I think that this weakness is attributable to the Commission's legalistic approach to the monitoring of the implementation of socio-economic rights. This is not to say legal issues are irrelevant to the inquiry—quite the contrary, they are central. The issue, however, as Opsahl writes, is not only to determine what laws and policies governments have written and, we may add, how they understand constitutional terms, but also how those laws, policies and understandings translate to better life in reality. (See Section 5.2.1.1.6 hereof.)

The SAHRC's legalistic approach to the inquiry is perhaps understandable, even though it has only a limited potential to deal meaningfully with the task at hand. By its very nature, an organisation such as the SAHRC must place a premium on advocacy work, which in turn locates it in a criticising mode. Therefore it makes sense for it to examine government's understanding of the law and then whether government is acting in terms of the law. However a fuller inquiry would require that the SAHRC steeps itself in the method and practice of empirical and factual investigation.

I have attempted to fill in the empirical gaps left by the Commission's preferred style of inquiry. It seems clear in respect of each of the seven socio-economic rights that, from an empirical standpoint, there is a huge distance that must still be travelled before the deprivation which is sought to be addressed by the seven rights can be dented. This is not to deny that progress has been made in the fulfilment of a number of the seven rights under consideration. With reference to housing, for instance, it is significant that 75% of the houses government promised in 1994 have been delivered. To be sure, their adequacy is a matter that must always be open to healthy debate. The failure to deliver the remaining 25%, together with the question whether one million houses should have been the projection, must also always be open to healthy debate. But still, 75% delivery is significant.

However that should not preclude an inquiry into whether, in terms of the set standards and criteria, the fulfilment of these rights is as it should be. Whilst recognising the positive results achieved, the limitations should be pointed out consistently. Where, for instance, the state introduces retrogressive measures in respect of any of the rights under review, that fact must be pointed out. It must be pointed out that such retrogressive measures, such as indeed was the case with many of the rights, amounts to their denial unless justified by recognised grounds.

True, there are limited funds available for the fulfilment of these rights. However that is a matter to be argued by the state in the face of critical inquiry into its failure to live up to the injunctions of the constitution. It is not an argument to be internalised by those charged with monitoring the performance of the state with reference to socio-economic rights. Failure to pose the relevant questions and to offer the justified criticism will get the state accustomed to the fact that the questions are not asked and the criticism is not made. Over a time such complacency might end up being the norm. Then the intended beneficiaries of these rights might be placed in the situation where they have to justify their expectation that the state will deliver certain goods and services, whereas it is the state that must justify its failure to provide them.

Consequently, it is important that the Commission revisits its approach to such inquiry at least in three respects. First, the Commission can attach the necessary significance to factual matters as distinct from legal matters. Such an approach would not exclude legal questions from the Commission's inquiry. It would only mean that once those have been sorted out, their application and effect on real life situations must still be determined. As I have tried to show, it is not necessary that the Commission do all the empirical investigation that might be necessary. It could use the work of others in the field in order to try and answer questions that arise in its own study.

Second, the Commission might need to take methodological issues a bit more seriously. That the Commission invests a lot of effort in the work it does on monitoring the implementation of socio-economic rights can never be doubted. Precisely because it takes its work in this area so seriously, it seems to me obvious that the Commission should not open itself up to situations where its findings can be impugned for want of a sound methodological approach. What the Commission did in the study under review was laudable and should have yielded a lot of reliable data. However there is no clear research plan in the Commission's inquiry to indicate why it embarked on three separate research processes in order to investigate the same issue which, as I suggest, was a sound beginning. Why, not even in its analysis of the data that emanated from these three separate processes does the Commission make an attempt to marry their outcome!

Third, the Commission could be a little more rigorous in its analysis of the data it has. The very least that can be expected of any study is that it must answer the question(s) it raises for itself. If it fails to answer other questions, it is possible to defend it on the basis that it was not concerned with such questions even though it might be argued that it ought to have been. But if a study fails to answer its own questions it becomes indefensible. I have referred at different places in this study to questions that the Commission raises but makes no effort to answer and instead blames government for not answering the said questions. That is one indication of the weakness I refer to. Another, and probably the bigger, is that the fundamental question lying at the heart of the SAHRC study is whether the government is honouring its constitutional mandate in respect of the *realisation* of socio-economic rights. If the Commission had answered this question, the study would be monumental even if it were a failure in all other respects.

In that, I suggest, lies the importance, at least in part, of a meta-analytical approach to the study. It fulfils a dual purpose. It is at once an analysis of what government does or does not do and of how those who hold a constitutional brief to monitor government's

performance carry out that brief. Therefore the reader can in one glance, as it were, form a picture of how well government is doing in its constitutional mandate to give effect to socio-economic rights and of how well the SAHRC is fulfilling its monitoring constitutional mandate.

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