

## **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.<sup>1</sup>

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.<sup>2</sup> 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.

##### **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 the 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*,<sup>3</sup> *The Extension of Security of Tenure Act*<sup>4</sup> and *The Housing Act*<sup>5</sup>. 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".<sup>6</sup> And then it observes that the laws referred to in Section 5.2.1.1 hereof do in fact take cognisance of these issues to a significant extent.<sup>7</sup> Further, the SAHRC states that existing legislation<sup>8</sup> 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.<sup>9</sup>

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 telecommunication services.

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 needs 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".<sup>10</sup> 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".<sup>11</sup> The SAHRC lists the poor, the disabled, female-headed households, 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.<sup>12</sup>

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.<sup>13</sup> 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.

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".<sup>14</sup> 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*,<sup>15</sup> the *Prevention of Illegal Evictions from and Unlawful Occupation of Land Act*<sup>16</sup> and the *Extension of Security of Tenure Act*<sup>17</sup> 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:

. . . , 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.<sup>18</sup>

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,<sup>19</sup> 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 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.<sup>20</sup>

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".<sup>21</sup>

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",<sup>22</sup> 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;
- 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.<sup>23</sup>

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 corner stone 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 been placed before it.

#### 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.<sup>24</sup>

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 government'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%.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup> 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 reflected on paper, the reports must also refer to actual practice, In this regard, statistical data is often useful and sometimes even necessary.<sup>28</sup>

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 1999/2000 was R3 529 825b.<sup>29</sup> 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.<sup>30</sup>

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'".<sup>31</sup> He suggests further that the duty to bring about the progressive realisation of a right implies that there must be no "backward movement of any kind".<sup>32</sup> 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 comments 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'" <sup>33</sup>

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.

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.<sup>34</sup>

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

<u>Budget Item</u>	<u>Rand 1998/99</u>	<u>% Budget</u>	<u>Rand 99/00</u>	<u>% Budget</u>
Housing	R3, 6b	1,8	R3, 5b	1,6
Education <sup>35</sup>	R46, 3b	22,1	R48, 5b	22,4
Health Care	R23, 3b	12,2	R24, 0b	11,1
Water <sup>36</sup>	R2, 9	1,1	R2, 5b	1,1
Welfare/Social security	R19, 3b	9,7	R19, 6b	9,19 <sup>37</sup>
Environment	R463m	0,23	R632m <sup>38</sup>	0,29
Agriculture (food)	R718, 8m	0,33	R637m	0,31

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

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 expenditure on agriculture, takes a nosedive. 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.<sup>39</sup> 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.

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 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**

<b><u>Budget Item</u></b>	<b><u>Amount</u></b>		
	<b>89/90</b>	<b>90/00</b>	<b>% Increase</b>
Administration	R28 177m	R30 483m	7,5
Policy Development	R226 497m	R49 656m	(78,03)
Housing Performance	R457 725m	R469 844m	2,58
SA Housing Fund	R2 909 713b	R2 971 121b	2,06
<b>Total</b>	<b>R3 621 712b</b>	<b>R3 521 104b</b>	<b>(65,89)</b>

Source: RSA Estimate of Expenditure<sup>40</sup>

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, the period under review, the money allocated for actual provision of houses experienced the least growth, expressed as a percentage of the allocations.

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.

*HRC Quarterly Review*, October 1999, p. 47 by way of example of how a province might apply the funds.

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

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

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

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 the 1995/96 budget.<sup>42</sup> 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 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.<sup>43</sup>

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 5: Changes in Budgetary Priorities between 1995 and 2000**

Budget Item	R96/96	%	R96/97	%	R97/98	%	R98/99 <sup>44</sup>	%	R99/00	%
Int. on Debt	28b	2,5,5	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 <sup>45</sup>	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*

It is evident from Table 6 below 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 under take 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.

**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

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%
Mpumulanga	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%
<b>South Africa</b>	<b>2 603 717</b>	<b>100%</b>	<b>29%</b>	<b>1 000 000</b>	<b>38%</b>

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.<sup>46</sup> 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 1999, a total of 745 717 (75%) had been built.<sup>47</sup> Even if the target had been met, however, that would 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 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.<sup>48</sup>

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. 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.<sup>49</sup> 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 directorates 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.<sup>50</sup>

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 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.<sup>51</sup> 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".<sup>52</sup>

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.<sup>53</sup>

#### *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.<sup>54</sup> 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 below 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).

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.

**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 of 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%
Mpumulanga	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%
Northern Province	8,6%	86 000	89 890	49 750	59%
Western Cape	11,4%	114 000	124 029	103 730	91%
<b>Total</b>	<b>100%</b>	<b>1 000 000</b>	<b>1 035 161</b>	<b>745 717</b>	<b>75%</b>

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

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".<sup>55</sup> 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 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.<sup>56</sup>

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<sup>57</sup>

## **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.<sup>58</sup>

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 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.<sup>59</sup>

### **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.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> Now, a person's health has a direct bearing on his/herright 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".<sup>63</sup> The United Nations Human Rights Committee, however, has stated explicitly that:

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 State parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

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.<sup>65</sup> 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 13,8% of the national budget.<sup>66</sup>

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 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.<sup>68</sup>

**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	176	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 <sup>67</sup>	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

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 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 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.

**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.

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 care, 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.<sup>69</sup> Note may be taken of the fact that, at the end of 1997, there were some 175 599 registered nurses in South Africa.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> 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. With the outbreak of cholera, for instance, public hospitals discharge patients who have not fully recovered in order to make room for others. 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.<sup>74</sup> 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.

### **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.<sup>75</sup>

The Commission did not ask for reports relating to food from the departments of Health, Welfare and Finance.<sup>76</sup> 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".<sup>77</sup>

#### **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 past 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 them in its report? In its *Fourth Annual Report*, the Commission states that it released its *First Annual Socio-Economic Rights Report* in March 1999.<sup>78</sup> 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.

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.<sup>79</sup> 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.<sup>80</sup>

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.<sup>1</sup> 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 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 below 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 R1400. 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.

**Table 11: Monthly Household Income by Population Group:1998**

Income Group/Month	Total Population	African	Coloured, Indian White <sup>82</sup>	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.

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. 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.<sup>83</sup> However the responses can be checked against other studies on the same subject. In this regard reference can be made to a SANGOCO study<sup>84</sup> 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*.<sup>85</sup>

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.<sup>86</sup>

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 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.<sup>87</sup> 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.<sup>88</sup> 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, availability, assurance of supply, upgradability of services, equitable access, sustainable management and use, and cultural and social appropriateness.<sup>89</sup>

### **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.<sup>90</sup>

#### **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.<sup>91</sup>

#### **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.<sup>92</sup> 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.<sup>93</sup>

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 %
<b>Eastern Cape</b>	<b>1 210 229</b>	<b>34</b>
<b>Free State</b>	<b>193 686</b>	<b>6</b>
<b>KwaZulu-Natal</b>	<b>435 643</b>	<b>12</b>
<b>Mpumulanga</b>	<b>480 933</b>	<b>14</b>
<b>North West</b>	<b>437 572</b>	<b>12</b>
<b>Northern Cape</b>	<b>24 932</b>	<b>1</b>
<b>Northern Province</b>	<b>619 775</b>	<b>18</b>
<b>Western Cape</b>	<b>121 607</b>	<b>3</b>
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 1988. 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.<sup>94</sup> 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, whereas the SAIRR cites Minister Bonnie 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.<sup>95</sup> 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 65 of Chapter 5. Therefore in the period 1996-1998 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%.<sup>96</sup> 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.

#### **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.<sup>97</sup> 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.<sup>98</sup>

### **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.

### **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 this period 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.<sup>99</sup> 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%.<sup>100</sup> Viewed over a longer period, therefore, and taking inflation into account, the government has introduced a retrogressive budgetary measure in respect of social security.

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



**Table 13: Movies 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
Mpumulanga	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
<b>Total</b>		<b>R15 552 574<sup>101</sup></b>	

Source: SAIRR, 2000, p. 238.

## 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 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.<sup>102</sup>

### **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.<sup>103</sup> 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.<sup>104</sup> Further, the Department makes no reference to any plan for the realisation of the right to reading materials of detained persons.<sup>105</sup>

### **5.2.6.3 Provincial and Local Governments**

Of the five provinces<sup>106</sup> 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.<sup>107</sup> 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 governments.<sup>108</sup> 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 34, 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 education is not adequate for the realisation of the right to education. However there is a more direct way of approaching the question.

According to Table 14 below some 18,4% of what one might call South Africa's adult population had no education at all in the period under review. 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.<sup>109</sup> 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<sup>110</sup> and therefore, over seven years, approximately R107 143 per annum, R9 400 per annum represents a mere 8,8% of what it costs to train a medical doctor per year. That also seems clearly inadequate.

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.

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

Province	No Schooling	Some Primary	Some Secondary	Std 10	Higher	Unspecified /Other	Total
E. Cape	617 796	899 711	966 341	328 637	139 200	88 987	<b>3 040 672</b>
F. State	236 148	458 384	493 148	199 654	76 265	49 453	<b>1 513 052</b>
Gauteng	419 157	812 267	1 780 368	1 042 744	369 972	402 764	<b>4 826 928</b>
KZN	957 217	1 026 021	1 328 708	665 303	200 819	217 428	<b>4 395 496</b>
M. Langa	410 337	307 000	403 474	203 102	69 551	58 967	<b>1 452 430</b>
N. West	403 143	503 301	560 987	236 188	75 258	61 774	<b>1 840 651</b>
N. Cape	97 692	134 149	139 233	53 482	25 939	18 027	<b>468 521</b>
N. Province	771 587	376 663	556 667	293 703	94 107	95 312	<b>2 188 040</b>
W. Cape	151 109	556 696	901 196	435 620	243 954	119 855	<b>2 420 430</b>
<b>Total</b>	<b>4 066 187</b>	<b>5 084 189</b>	<b>7 130 121</b>	<b>3 458 434</b>	<b>1 294 720</b>	<b>1 112 568</b>	<b>22 146 220</b>

Source: SAIRR, 2000, p. 110<sup>111</sup>

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 below establishes two imported facts. First, that the number of candidate who take the matriculation examinations are on the decline. Second, that the number of candidates who pass the examinations are also on the decline.

According to Table 15 there was 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.<sup>112</sup>

**Table 15: Candidate who wrote the Matriculation Examinations: 1996-1999<sup>113</sup>**

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
Mpumulanga	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	31 830	12 130	37 063	8 617	38 546	9 028	37 199	9 090
<b>Total</b>	<b>518 225</b>	<b>80 015</b>	<b>559 233</b>	<b>70 127</b>	<b>552 862</b>	<b>69 856</b>	<b>511 474</b>	<b>63 725</b>

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

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 .,.

Therefore it seems obvious that, far 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 obligations for their bearer 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 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 insist that those for whom they are meant must avail themselves of them to the maximum of their abilities!

A further criticism of the Commission's study relates to its failure to include the Department of Arts, Culture, Science and Technology as a department in which the duty to fulfill the right to education resides. As mentioned before that Department has relevance to education. DACST's relevance to education, is actually greater than that of the Department of Correctional Services. Therefore the investigation would have been enriched had the Department of Arts, Culture, Science and Technology been included.

## **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.<sup>115</sup>

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.<sup>116</sup>

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<sup>117</sup>

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".<sup>118</sup>

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.<sup>119</sup> 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".<sup>120</sup> 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.<sup>121</sup>

### **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.<sup>122</sup>

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.<sup>123</sup>

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".<sup>124</sup>

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.<sup>125</sup>

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.<sup>126</sup> Although the Western Cape sent a response, there was nothing in it on environmental rights as required by the protocol.<sup>127</sup>

### **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.<sup>128</sup>

### **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 sites 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.<sup>129</sup> 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 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 sites 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 hardly 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,<sup>130</sup> 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.

#### **footnote**

- <sup>1</sup> 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.
- <sup>2</sup> Section 7(2) of the constitution.
- <sup>3</sup> Act No 67 of 1995.
- <sup>4</sup> Act No 62 of 1997.
- <sup>5</sup> Act No 107 of 1997.
- <sup>6</sup> SAHRC,1998, Vol. IV, p. 1.
- <sup>7</sup> 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) 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.
- <sup>8</sup> The Housing Act.
- <sup>9</sup> SAHRC,1998, Vol.IV, p. 2.
- <sup>10</sup> SAHRC,1998, Vol. IV, p. 9.
- <sup>11</sup> SAHRC,1998, Vol. IV, p. 9.
- <sup>12</sup> See Craven, 1995, p.109.
- <sup>13</sup> See SAHRC,1998, Vol. IV, p. 7.
- <sup>14</sup> SAHRC, 1998, Vol. IV, p. 8.
- <sup>15</sup> Act No 80 of 1976.
- <sup>16</sup> Act No 19 of 1998.
- <sup>17</sup> Act No 62 of 1997.
- <sup>18</sup> 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.
- 20 Craven, *supra*, p. 109.
- 21 SAHRC, 1998, Vol. IV, p. 9.
- 22 SAHRC, 1998, Vol. IV, p. 7.
- 23 SAHRC, 1998, Vol. IV, pp. 9-10.
- 24 Craven, *supra*, pp. 136-137 and 142-143.
- 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.
- 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.
- 32 Craven, *supra*, p. 131.
- 33 Craven, *supra*, pp. 131-132.
- 34 A budgetary change by 0,5% and less is insignificant - see Fair Share, 2000/01 National Budget Handbook, p. 7.
- 35 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.
- 36 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.
- 37 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".

- 38 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.
- 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
- 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.
- 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 as 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 19%.
- 46 Rick de Satge and Colleen Morna, Homeless Have Little Hope of Help from Government, Reconstruct: Mail & Guardian, July 12 to 18, 1996.
- 47 SAIRR, supra, p.168.
- 48 SAHRC,1998, Vol. IV, p. 10.
- 49 SAHRC,1998, Vol. IV, p. 11.
- 50 SAHRC,1998, Vol. IV, p.12.
- 51 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.
- 52 SAHRC, 1998, Vol. IV, p. 12.
- 53 SAHRC, 1998, Vol. IV, p. 12.
- 54 SAHRC, 1998, Vol. IV, p, 12.
- 55 SAHRC, 1998, Vol. IV, p. 18.
- 56 SAHRC, 1998, Vol. IV, p. 16.
- 57 SAHRC, 1998, Vol. IV, p. 20.
- 58 SAHRC, 1998, Vol. IV, pp. 20-21.

- 59 SAHRC, 1998, Vol. IV, p. 21.
- 60 See E/CN.4/SR.222 at 17 (1951).
- 61 SAIRR, South Africa Survey 1999/00, p.164.
- 62 See Ramcharan, in Netherlands International Law Review, Vol. XXX,1983/3, p. 301.
- 63 Fawcett, 1969, p. 31.
- 64 Ramcharan, supra, p. 301.
- 65 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 an the health budget, which might change the picture.
- 66 See Fair Share, 2000/01 National Budget Handbook, p. 7.
- 67 Source of infection outside SA.
- 68 SAIRR, supra, pp. 211 and 213 respectively.
- 69 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, had the two provinces been included, the figure might be 3 070. I suggest that this would not make any substantial difference.
- 70 SAIRR, supra, pp. 227 & 230.
- 71 SAIRR, supra, p. 228.
- 72 SAIRR, supra, p. 228.
- 73 SAIRR, supra, pp. 231 and 234 respectively.
- 74 SAIRR, supra, p. 234.
- 75 SAHRC,1998, Vol. IV, p. 21.
- 76 SAHRC,1998, Vol. IV, p. 21.
- 77 SAHRC,1998, Vol. IV, pp. 21-22.
- 78 SAHRC, Fourth Annual Report, December 1998-December 1999, p. 55.
- 79 See Article 11 of the ICESCR; Craven, supra ("The Right to an Adequate Standard of Living"), pp. 307-308; Ramcharan, supra, pp. 305-307.
- 80 See Tomasevski,1987, pp. 5-7.

- 81 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.
- 82 The SAIRR explains that the individual groups were too small to record. Therefore they are combined in this manner,
- 83 See McNeill, *supra*, p. 13.
- 84 NGO Matters, 1991, 2(9), August.
- 85 SAIRR, *supra*, pp. 306 and 307.
- 86 SAIRR, *supra*, pp. 299 and 300.
- 87 See Evening Post, 19 April 2000.
- 88 SAHRC, 1998, Vol. IV, p. 22.
- 89 SAHRC, 1998, Vol. IV, pp. 22-23.
- 90 SAHRC, 1998, Vol. IV, pp. 24-25.
- 91 SAHRC, 1998, Vol. IV, pp. 25-26.
- 92 SAHRC, 1998, Vol. IV, p. 26.
- 93 SAHRC, 1998, Vol. IV, p. 26.
- 94 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.
- 95 Fair Share, Key Elements of the 1997/98 Budget, p. 2.
- 96 Fair Share, Summary of National Budget Expenditures: 1998/99 and 1999/00.
- 97 SAHRC, 1998, Vol. IV, pp. 32-33.
- 98 SAHRC, 1998, Vol. IV, p. 34.
- 99 The social welfare budgets for the relevant years were R19,3b (98/99); R19,8b (99/00) and R23,3b (00/01).
- 100 Fair Share, 2000/01 National Budget Handbook, p. 4.
- 101 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.
- 102 SAHRC, 1998, Vol. IV, p. 38.

- 103 SAHRC, 1998, Vol. IV, p. 39.
- 104 SAHRC, 1998, Vol. IV, p. 40.
- 105 SAHRC, 1998, Vol. IV, p. 42.
- 106 Free State, Gauteng, KwaZulu-Natal, Mpumalanga and Northern Cape.
- 107 SAHRC, 1998, Vol. IV, p. 39.
- 106 SAHRC, 1998, Vol. IV, p. 42.
- 107 Fair Share, Key Concerns About the 1997/98 Budget and the Macro-economic Plan (GEAR), p. A-3.
- 110 Ibid., p. A4.
- 111 The SAIRR notes that totals might not tally, although they should, due to rounding off.
- 112 White Paper on Science and Technology, *supra*, p. 3.
- 113 I count as passes only those candidates who gained university entrance qualifications for purposes of a degree.
- 114 Drucker, 1994, p. 62. Indeed, this is also a view expressed in the S&T White Paper itself - see at p. 5.
- 115 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 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.
- 116 SAHRC,1998, Vol. IV, p. 44.
- 117 Ibid., p. 45.
- 118 Ibid.
- 119 Ibid.
- 120 Ibid.

- 121 Ibid., p. 46.
- 122 Ibid., p. 48.
- 123 Ibid., p. 49.
- 124 Ibid.
- 125 Ibid., pp. 49-50.
- 126 Ibid., p. 50.
- 127 Ibid.
- 128 Ibid., p. 51.
- 129 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.
- 130 SAHRC,1998, Vol. IV, p. 52.