Chapter 6
Conclusion

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

In Chapter 4 I have dealt with the methodological strengths and weaknesses of the SAHRC inquiry into the implementation of Socio-Economic rights. I reserved the question whether the evidence gathered supports the conclusions drawn to a stage when I would have dealt with the Commission's conclusions (see Section 4.3.2.4 hereof). A cursory glance at the contents of Chapter 5 would suggest that it is hard to pinpoint conclusions drawn by the Commission that might even remotely throw up the question of inferential validity. As I have pointed out repeatedly in dealing with the Commission's analysis of the data, the question that concerned it most was whether respondents to its protocols understood the meaning of the key terms - viz. "respect", "protect", "promote" and "fulfil".

At places the Commission concludes that respondents understood the terms and at others that they did not. Whatever its conclusions, the methodological question of inferential validity simply does not arise, since the respondents' understanding or misunderstanding of those terms has nothing to do with the methods used by the Commission to gather or analyse the data. But if that is so, the question as to the utility of the SAHRC study must arise. In other words, if the Commission does not draw any conclusions that can be tested in respect of validity, what was the cash value of the study?

I take the view that this is a major weakness of the SAHRC's inquiry, and I think that this weakness is attributable to the Commission's legalistic approach to the monitoring of the implementation of Socio-Economic rights. This is not to say legal issues are irrelevant to the inquiry - quite the contrary, they are central, The issue, however, as Opsahl writes, is not only to determine what laws and policies governments have written and, we may add, how they understand constitutional terms, but also how those laws, policies and understandings translate to better life in reality, (See Section 5.2.1,1.6 hereof.)

The SAHRC's legalistic approach to the inquiry is perhaps understandable, even though it has only a limited potential to deal meaningfully with the task at hand. By its very nature, an organisation such as the SAHRC must place a premium on advocacy work, which in turn locates it in a criticising mode. Therefore it makes sense for it to examine government's understanding of the law and then whether government is acting in terms of the law, However a fuller inquiry would require that the SAHRC steeps itself in the method and practice of empirical and factual investigation.

I have attempted to fill in the empirical gaps left by the Commission's preferred style of inquiry. It seems clear in respect of each of the seven Socio-Economic rights that, from an empirical standpoint, there is a huge distance that must still be travelled before the deprivation which is sought to be addressed by the seven rights can be dented. This is not to deny that progress has been made in the fulfilment of a number of the seven rights under consideration. With reference to housing, for instance, it is significant that 75% of the houses government promised in 1994 have been delivered. To be sure, their adequacy is a matter that must always be open

to healthy debate. The failure to deliver the remaining 25%, together with the question whether one million houses should have been the projection, must also always be open to healthy debate. But still, 75% delivery is significant.

However that should not preclude an inquiry into whether, in terms of the set standards and criteria, the fulfilment of these rights is as it should be. Whilst recognising the positive results achieved, the limitations should be pointed out consistently. Where, for instance, the state introduces retrogressive measures in respect of any of the rights under review, that fact must be pointed out. It must be pointed out that such retrogressive measures, such as indeed was the case with many of the rights, amounts to their denial unless justified by recognised grounds.

True, there are limited funds available for the fulfilment of these rights. However that is a matter to be argued by the state in the face of critical inquiry into its failure to live up to the injunctions of the constitution. It is not an argument to be internalised by those charged with monitoring the performance of the state with reference to Socio-Economic rights. Failure to pose the relevant questions and to offer the justified criticism will get the state accustomed to the fact that the questions are not asked and the criticism is not made. Over a time such complacency might end up being the norm. Then the intended beneficiaries of these rights might be placed in the situation where they have to justify their expectation that the state will deliver certain goods and services, whereas it is the state that must justify its failure to provide them.

Consequently, it is important that the Commission revisits its approach to such inquiry at least in three respects. First, the Commission can attach the necessary significance to factual matters as distinct from legal matters. Such an approach would not exclude legal questions from the Commission's inquiry. It would only mean that once those have been sorted out, their application and effect on real life situations must still be determined. As I have tried to show, it is not necessary that the Commission do all the empirical investigation that might be necessary. It could use the work of others in the field in order to try and answer questions that arise in its own study.

Second, the Commission might need to take methodological issues a bit more seriously. That the Commission invests a lot of effort in the work it does on monitoring the implementation of Socio-Economic rights can never be doubted. Precisely because it takes its work in this area so seriously, it seems to me obvious that the Commission should not open itself up to situations where its findings can be impugned for want of a sound methodological approach. What the Commission did in the study under review was laudable and should have yielded a lot of reliable data. However there is no clear research plan in the Commission's inquiry to indicate why it embarked on three separate research processes in order to investigate the same issue which, as I suggest, was a sound beginning. Why, not even in its analysis of the data that emanated from these three separate processes does the Commission make an attempt to marry their outcome.

Third, the Commission could be a little more rigorous in its analysis of the data it has. The very least that can be expected of any study is that it must answer the question(s) it raises for itself. If it fails to answer other questions, it is possible to defend it on the basis that it was not concerned with such questions even though it might be argued that it ought to have been. But if a study fails to answer its own questions it becomes indefensible. I have referred at different places in this study to questions that the Commission raises but makes no effort to answer and instead blames government for not answering the said questions. That is one indication of the weakness I refer to, Another, and probably the bigger, is that the fundamental

question lying at the heart of the SAHRC study is whether the government is honouring its constitutional mandate in respect of the *realisation* of Socio-Economic rights. If the Commission had answered this question, the study would be monumental even if it were a failure in all other respects.

In that, I suggest, lies the importance, at least in part, of a meta-analytical approach to the study. It fulfils a dual purpose. It is at once an analysis of what government does or does not do and of how those who hold a constitutional brief to monitor government's performance carry out that brief. Therefore the reader can in one glance, as it were, form a picture of how well government is doing in its constitutional mandate to give effect to Socio-Economic rights and of how well the SAHRC is fulfilling its monitoring constitutional mandate.