An interpretation of "relevant organs of state" in section 184(3) of the Constitution and their duty to provide information on socio-economic rights to the South African Human Rights Commission[1]

KARRISHA PILLAY

Researcher: Economic and Social Rights Project
Community Law Centre
University of Western Cape

1 INTRODUCTION

Economic and social rights have historically been considered to be non-justiciable[2] and accordingly less worthy of constitutional protection. This category of rights is, as a result, fairly undeveloped in both its content and application when compared to civil and political rights. Whilst international law has recognised socio-economic rights since the Universal Declaration on Human Rights[3] in 1948, this rhetoric has not been matched by effective enforcement procedures. Socio-economic rights have, accordingly been regarded as a so-called "second generation" of human rights.[4]

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2 Unlike civil and political rights, which could be easily applied by courts and similar judicial bodies, economic and social rights were considered to be more political in nature as well as costly in their implementation. However, it is now recognised that many of the reasons advanced for their non-justiciability were either overstated or mistaken. In this regard see Matas 1995:123.

3 The Universal Declaration on Human Rights (UDHR) proclaims civil and political rights as well as economic, social and cultural rights. Though the UDHR is not a legally binding instrument, many have argued that its provisions form part of customary international law. Article 25 is of particular relevance to socio-economic rights. It provides: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

4 Economic, social and cultural rights were often argued to constitute a "second generation" of human rights, the first generation being civil and political rights. The main distinguishing

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However, the emerging international trend recognises that economic and social rights are a fundamental and indispensable component of human rights.[5] The South African Constitution[6] has broken new ground in a range of socio-economic rights, by its explicit and unequivocal protection of these rights.[7] However, the challenge lies in translating these constitutional rights into tangible realities for the people of South Africa.

In recognition of the difficulty of enforcing the positive duties imposed by socio-economic rights primarily through the courts,[8] the Constitution also establishes other mechanisms for their enforcement.[9] One such mechanism is the monitoring function of the South African Human Rights Commission.[10] Section 184(3) of the Constitution expressly provides that the Human Rights Commission must each year require "relevant organs of state" to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. This unique domestic monitoring procedure on the

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factor between both these categories of rights centres around the perceived role of the state. It is generally emphasised that civil and political rights require freedom from state interference whereas economic and social rights entail positive obligations on the state for their protection. Whilst there is some truth in this assertion, it is subject to numerous and substantial qualifications, as has been recognised by Eide amongst others. See Eide 1995: 15.

5 For example, the Vienna Declaration of 1993 enjoins the world community to "treat human rights globally in a fair and equal manner on the same footing and with the same emphasis". It further states: "all human rights are universal, indivisible, and interdependent and interrelated". The World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF. 157/23, Part 1, para 5.

6 Constitution of the Republic of South Africa, 1996 Act 108 of 1996 (hereafter the 1996 Constitution).

7 These rights include the environment (s 24), access to land, security of tenure and restitution (s 25(5) to (9)), access to adequate housing (s 26), access to health care services, sufficient food and water and social security (s 27), children's socio-economic rights (s 28(1)(c), education (s 29) and the socio-economic rights of detained persons (s 35(2)(e)).

8 S 34 of the Constitution provides as follows: "Everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." However, as most persons still lack the financial resources to enforce their socio-economic rights through the courts, lodging complaints with institutions such as the South African Human Rights Commission is a cheap, accessible and important avenue.

9 For example, the Commission for Gender Equality (CGE), as provided for in s 187 of the Constitution, is tasked with promoting respect for gender equality and the protection, development and attainment of gender equality. In fulfilling its mandate, the CGE may monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. It can be inferred that the CGE may, in the exercise of this mandate, focus on gender equality in access to socio-economic rights.

10 The Human Rights Commission was established in terms of s 115 of the interim Constitution (Act 200 of 1993). S 184 of the 1996 Constitution further recognizes the Human Rights Commission as one of the State Institutions Supporting a Constitutional Democracy. The Commission is accorded various functions and powers aimed at the protection and promotion of human rights in South Africa. These powers and functions are provided for in the 1996 Constitution and the Human Rights Commission Act 54 of 1994.

realisation of economic and social rights, is critical to ensuring their proper implementation. It allows for an assessment of the progress being made in realising the rights, identifying violations of the rights[11] as well as the possibility of remedial steps in cases of violations.[12]

However, in fulfilling its mandate of monitoring socio-economic rights, the Human Rights Commission is faced with a number of challenges. Amongst the challenges facing the Human Rights Commission is the task of determining which are in fact the relevant organs of state for the purposes of the said section. The Commission has recently completed its first cycle of monitoring in terms of section 184(3) of the Constitution. It interpreted the term "relevant organs of state" to include national departments that are relevant to the listed socio-economic rights in section 184(3), all provincial governments and the South African Local Government Association (SALGA). The Commission accordingly directed requests for information to the national departments of Housing, Health, Environmental Affairs and Tourism, Finance, Water Affairs and Forestry, Land Affairs, Education, Welfare, Correctional Services and Agriculture, all of the provincial governments as well as SALGA. The Commission is currently preparing for its second phase of monitoring socio-economic rights.

This paper re-examines the question of who are "relevant organs of state" for the second monitoring cycle. It suggests that the "relevant organs of state" can be established by identifying the organs of state that bear an obligation to realise socio-economic rights. It will argue that organs of state that bear a primary responsibility for the realisation of these rights, is for the purposes of section 184(3) a "relevant organ of state".

The paper will begin with a definition of an organ of state as well as some examples of the types of institutions that will fall within the ambit of such definition. Specific attention will then be accorded to organs of state that have a primary function to realise socio-economic rights and are accordingly relevant organs of state for the purposes of section 184(3). The remaining sections of the paper will focus on some practical considerations facing the Human Rights Commission in its task of monitoring socio-economic rights.

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11 See Liebenberg 1997: 161.

12 Should the Human Rights Commission identify a violation of a particular socio-economic right, it must then decide on appropriate remedial steps in terms of its constitutional and statutory powers. These could include:
- conducting further research and studies on the problem;
- conducting an investigation;
- undertaking mediation, conciliation or negotiation;
- making recommendations on policy or legislation to relevant organs of state;
- highlighting the violation and factors which, in the opinion of the Human Rights Commission, gave rise to it in reports to the President and Parliament; and
- instituting litigation (Liebenberg 1997: 161).

2 DEFINING AN ORGAN OF STATE

Section 239 of the Constitution defines an organ of state as follows:

> "Unless the context indicates otherwise –
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> 'Organ of state' means:
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> (a) Any department of state or administration in the national, provincial or local sphere of government; or
>
> (b) Any other functionary or institution –
>
> (i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) Exercising a public power or performing a public function in terms of any legislation but does not include a court or judicial officer."

Some of the specific institutions or functionaries that constitute an organ of state for the purposes of section 239 will be examined in the present section. This task involves an analysis of section 239, and an identification of the specific bodies that can be regarded as "organs of state" in each subsection.

2.1 A department of state or administration in the national, provincial or local sphere of government

In view of the express reference in section 239(a) to state departments and administration in the national, provincial and local sphere of government, it is clear that the state departments and administration within these three spheres of government fall within the ambit of an organ of state within the meaning of section 239(a).

As section 239(a) makes specific reference to *any department of state or administration* as opposed to the legislatures, neither Parliament nor the provincial legislatures would, in terms of the section, constitute organs of state. However, the section makes it quite clear that the terms "department of state" and "administration" must, at least include the particular ministers, ministries and state departments responsible for executing legislation and policies.

2.2 Any other constitutional functionary or institution

Section 239(b)(i) refers to "any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution". Chapter 9 of the Constitution specifically provides for certain State Institutions supporting a Constitutional Democracy. These include that of the Public Protector,[13] the Human Rights Commission,[14] the Commission on the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,[15] the Commission for Gender Equality,[16] the Auditor General[17] as well as that of the Electoral Commission.[18] The relevant

13 S 182 Constitution.
14 S 184 Constitution.
15 S 185 Constitution.
16 S 187 Constitution.
17 S 188 Constitution.
18 S 190 Constitution.

sections reveal that each of these state institutions exercise their powers and perform their functions in terms of the Constitution. These state institutions accordingly qualify as organs of state for the purposes of section 239. In addition, as the Public Service Commission,[19] the Financial and Fiscal Committee[20] and the Central Bank[21] also exercise their powers and perform their functions in terms of the Constitution, they also qualify as organs of state for the purposes of section 239. Whilst it is acknowledged that these are by no means the *only* institutions or functionaries that would fall within the parameters of the subsection, these state institutions would clearly be *included* within the subsection and accordingly constitute organs of state.

2.3 Any other functionary or institution exercising a public power or performing a public function in terms of any legislation

Section 239(b)(ii) refers to "any other functionary or institution exercising a public power or performing a public function in terms of any legislation". In interpreting the section, the first question that begs an answer is whether the fact that a function is exercised in terms of legislation is in itself adequate for it to qualify as a public power or public function, or whether some additional criteria are necessary to ensure that it is indeed a public function or public power. This will require an inquiry into the definition of the terms "public power" and "public function."

In spite of there existing certain clear situations where an institution or functionary performs a public power or public function, there are numerous cases where the answer is far from obvious. In this regard, some guidance will be sought from administrative law. As the rules of judicial review apply primarily to public bodies exercising public functions or public powers, their definitions will be examined in the context of judicial review specifically.

In examining the boundaries of judicial review pertaining to public bodies exercising public powers, it is said that

> "as a general rule, the doings of private individuals and organizations are not reviewable by courts of law, while those of public bodies are. This corresponds with the notion that public bodies, because they exercise public powers, are subject to a sort of public trust which imposes special standards and duties on them. Most fundamentally, the law requires them to exercise their powers in the public interest, and not arbitrarily and for their own advantage; and more generally, they are subject to both the statutory terms on which their powers are conferred and to the common law rules imposed on them by the courts."[22]

Although the excerpt reveals the motivation behind public bodies that exercise public functions or powers being subject to judicial review, it offers

19 S 196 Constitution.
20 S 220 Constitution.
21 S 223 Constitution.
22 Boulle, Harris and Hoexter 1989: 247.

little insight as to the exact definition of a public function or public power. Wiechers has suggested various indicators which though not decisive, provide some guidance as to whether a public function or public power is being exercised.[23] He has divided these into formal and substantive criteria and suggests that if any one of a set of questions are answered in the affirmative, it is adequate for the body to qualify as a "public body" and accordingly for its functions and powers to qualify as "public" in nature.

According to Wiechers' formal criteria, any one of the following questions requires an answer in the affirmative for the existence of a public function or public power:

- whether the institution concerned is established by statute;
- whether the institution falls under the control of a recognised public authority; or
- whether the institution is staffed or funded from public resources.

Alternatively, any one of the following substantive criteria he proposes requires an affirmative answer to establish a public function or public power:

- whether the institution provides a public service; or
- whether the institution is endowed with coercive powers which it may wield over members of the public.

In the light of many private organisations rendering public services and many private businesses being subsidised by public funds, Baxter points out that these criteria are, in fact, inconclusive evidence of the existence of a public function. As an alternative, he suggests that the ultimate question be *whether the institution concerned is under a duty to act in the public interest and not simply to act to its own private advantage* and, it is in the light of this consideration that the rules of administrative law will apply.[24] Although this test was applied in *Dawnlaan Beleggings (Edms) v Johannesburg Stock Exchange*,[25] it has been criticised by Boulle, Harris and Hoexter[26] as being circular in reasoning. They point out that the conclusion that a body is under a duty to act in the public interest may well be based on the fact that it has already been recognised as a public body.

More recently, the courts have also had to grapple with the definition of an "organ of state" within the meaning of the Constitution.[27] In *Baloro and Others v University of Bophuthatswana and Others*,[28] the Supreme Court laid down certain factors to be considered for the determination of an organ of state. The case dealt with the applicability of fundamental rights in Chapter 3 of the interim Constitution to the University of Bophuthatswana.

23 Baxter 1984: 100.
24 Baxter 1984: 100.
25 1983 3 SA 344 (W).
26 Boulle, Harris and Hoexter 1989: 247.
27 The Constitutional Court held in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) that fundamental rights in the interim Constitution could be invoked against an organ of government, but not by one private litigant against another.
28 1995 4 SA 197 (B).

Section 233(1) of the interim Constitution defines an organ of state as "including any statutory body or functionary". In order for the fundamental rights in the interim Constitution to be applicable to the University, it had to qualify as an organ of state. The Court accordingly undertook an examination of the factors that would be necessary for the body to qualify as an organ of state which were summarised as follows:

- Whether the body or functionary is an "organ of state" depends largely on the extent to which it is integrated into the structures of authority in the state rather than on the nature of the statutory source to which it owes its existence.
- An "organ of state" can be established by a specific statute or else by virtue of a general statute providing for the general establishment of bodies or functionaries of that kind.
- Bodies which fulfil public functions, depend on infrastructural support by the state and therefore function in close cooperation with structures of state authority, as is mostly evidenced by the provision of state representation in their management structures, are "organs of state".
- Private bodies or institutions not established by or by virtue of any statute but fulfilling certain of their key functions under the supervision of organs of state are also "organs of state".[29]

In taking account of the aforementioned factors, the Court held that the University of Bophuthatswana is indeed an organ of state. In support thereof, it referred to the University of Bophuthatswana Act 10 of 1978 which makes the University subject to the ultimate exercise of control by the Minister of Education and the Executive Council.

In *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others*[30] further attention was accorded to the definition of an organ of state under the interim Constitution. The judge rejected the test set out in the *Baloro* case, as being too broad. He pointed out that a statutory body *per se* would not necessarily qualify as an organ of state. In support thereof, the Bible Society of South Africa and the Methodist Church of Southern Africa were cited as examples of bodies which, though created by statute, "can by no stretch of the imagination be described as organs of state."[31] The Court stressed that the meaning of a statutory body must be limited to those bodies which have characteristics of organs of state, i e, that they act authoritatively in the exercise of a government function or that they exercise their functions subject to the control of the state. In the said case, the Court established the test as being:

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29 *Supra* 230F-231E; 235J-236B; 246F.

30 1996 3 SA 800 (T). The case dealt with the applicability of the fundamental rights under the interim Constitution to Telkom South Africa Ltd. In order to determine the applicability of these rights to Telkom South Africa Ltd, the Court had to establish whether Telkom qualified as an organ of state or not. In applying its test of state control, the Court held that Telkom passed the test with "flying colours" to qualify an organ of state given the fact that it was an executive organ of government rendering public services under the control of the executive.

31 *Supra* 810.

> "limited to institutions which are an intrinsic part of government – i.e. part of the public service or consisting of government appointees at all levels of government – national, provincial, regional and local – and those institutions outside the public service which are controlled by the state i.e. where the majority of the members of the controlling bodies are appointed by the state or where the functions of that body and their exercise is prescribed by the state to such extent that it is effectively in its control".[32]

The Court drew the following analogy:

> "Implicit in this definition is that an organ is part of a greater entity, the state, as physically an organ is part of the human body. An organ of state is not an agent of the State; it is part of government (at all its levels)."[33]

In *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenefonds en 'n Ander*[34] further attention was accorded to the meaning of the term "organ of state". The Court applied the test of "control" as laid down in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others*. However, it observed that this test should not be applied rigidly. In applying the test to the joint municipal pension fund, the Court held that it was indeed under the control of the state and accordingly an organ of state. In support thereof, the Court noted that its constitution and rules could only be amended with the approval of the state and its entire existence is accessory to the existence of other state organs.

In view of the test laid down in the *Directory Advertising* case and followed in the *Munisipale Pensioenefonds* case, it is clear that in order for an institution or functionary to qualify as an organ of state for the purposes of the subsection, it must –

- be established by statute; and
- be an intrinsic part of government.

In establishing whether an institution or functionary is an intrinsic part of government, it is suggested that the following considerations are of relevance:

- whether the institution or functionary forms part of the public service;
- whether the institution or functionary provides a public service;
- whether the institution or functionary consists of government appointees;
- whether the institution or functionary, though outside the public service, has the majority of the members of its controlling board appointed by the state;
- whether the functions of that body and their exercise is prescribed by the state to the extent that it is effectively in the state's control; or
- whether the institution is staffed or funded from public resources.[35]

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32 *Supra* 810F-H.
33 *Supra* 809H.
34 1997 8 BCLR 1066 (T).
35 These considerations form a combination some of the criteria suggested by Wiechers and well as some of the key considerations outlined in recent case-law on the subject.

In addition, such powers or functions *must*, in terms of the express wording of section 239(b)(ii) be exercised *in terms of legislation* in order for it to qualify as a public power or public function for the purposes of the said subsection.

There is a large number of parastatals, most of which are statutory, and which are to a greater or lesser degree independent from state departments.[36] Although they are not part of the administration, they are defined as public organisations by virtue of the fact that they owe their origin to statutes, and that government controls or has a financial interest in them, that they perform a public service or their functions are regulated by statute. These include entrepreneurial bodies, regulatory bodies, public corporations, control boards and research institutes.[37] Examples of some parastatals would include Water Boards, the South African Housing Board etc. Although specific parastatals will have to be judged on their own facts, it is likely that most may be regarded as organs of state in terms of section 239, as they are established in terms of statute and clearly meet the criteria for their powers and functions to qualify as public in nature. For example, parastatals often fall under the control of specific government departments, are funded or staffed from public resources or perform a public service. For example, as the Development Bank of Southern Africa exercises it powers and duties in terms of the Development Bank of Southern Africa Act,[38] and clearly performs a public service, it would also in terms of section 239(b)(ii) of the Constitution qualify as an organ of state.

3 WHICH ORGANS OF STATE ARE *RELEVANT* TO THE REALISATION OF SOCIO-ECONOMIC RIGHTS?

Having defined the institutions and functionaries falling within the definition of an organ of state in terms of section 239 of the Constitution, the present section aims to examine the organs of state that are relevant to the realisation of socio-economic rights. Section 8 of the Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.[39] Sections 26 and 27 of the Constitution provide that everyone has the right of access to adequate housing, health care services, including reproductive health care, sufficient food and water and social security. These sections further provide that the *state* must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these rights. The New Shorter Oxford English Dictionary defines "realise" as "*to make real or realistic; convert into actuality*". The term realisation, when applied to the present context, refers to organs of state that bear a responsibility of converting the socio-economic rights in the Constitution into tangible realities. A study of the organs of state that have an obligation to realise socio-economic rights will determine the relevant organs of state for the purposes of section 184(3).

36 Baxter 1984: 120.
37 Baxter 1984: 120.
38 Development Bank of Southern Africa Act 13 of 1997.
39 S 8(1) Constitution.

3.1 The relevant organs of state within the three spheres of government

3.1.1 *National government*

Parliament has the power to, amongst other things, pass legislation with regard to any matter, including a matter within a functional area listed in Schedules 4 and 5.[40] Reference to *any matter* in the section clearly includes all of the socio-economic rights referred to in the Constitution. Furthermore, included in Schedule 4 are many of the specific socio-economic rights, such as education, the environment, housing, health care services and welfare services. In addition, the Schedules include many areas that are of significant importance or impact substantially on the realisation of socio-economic rights. However, although Parliament passes legislation relating to socio-economic rights, it does not constitute an organ of state in terms of section 239(a). Instead, it is the state departments and ministries that have a primary responsibility for implementing legislation giving effect to the realisation of the specific socio-economic rights that qualify as *relevant* organs of state.

It is not possible to classify information concerning socio-economic rights into neat compartments corresponding with specific government departments. Many departments may have overlapping mandates relating to a particular socio-economic right. For example the Department of Welfare and Population Development and the Department of Land Affairs and Agriculture may be concerned with different aspects of the right to food. However, it may be more practical for the Human Rights Commission to request information concerning the various socio-economic rights from the government department primarily responsible for the particular right (e g to direct the main questionnaire concerning the right of access to health care services to the Department of Health). The government department in question would then assume responsibility for ensuring a comprehensive supply of information regarding a specific right. These requests for information should be directed to the relevant Minister within each department. However, a specific questionnaire should be designed for the Department of Finance as its mandate clearly has a critical impact on the realisation of all socio-economic rights.

3.1.2 *Provincial government*

Provincial legislation may pertain to any matter within a functional area listed in Schedules 4 and 5, any matter outside those functional areas that is expressly assigned to the province by national legislation and any matter for which a provision of the Constitution envisages the enactment of provincial legislation.[41] Although such legislation would clearly include socio-economic rights, as has already been noted, the provincial legislatures do not constitute an organ of state. Instead, the provincial executive is at the helm of the provincial administration, and is accordingly the relevant organ of state in terms of section 239(a).

40 S 44 (1)(a)(ii) Constitution.
41 S 104(1)(b) Constitution.

In terms of section 125 of the Constitution, the provinces are empowered to implement national legislation in respect of Schedule 4 and 5 matters unless an Act of Parliament provides otherwise. As has already been noted, the functional areas included in these Schedules either coincide with the enlisted socio-economic rights in section 184(3) or may impact substantially on the implementation of these rights. These factors once more point to the fact that the provincial executives exercise vast powers and functions with regard to the realisation of socio-economic rights and are accordingly relevant organs of state for the purposes of section 184(3).

As the executive authority of the province is vested in the Premier, it is suggested that the Human Rights Commission direct requests for information to the Premier. The Premier should then assume responsibility for distributing and coordinating the information between the different departments that are responsible for the realisation of the enlisted socio-economic rights.

3.1.3 *Local government*

The objects as well as the developmental duties of local government provided for in the Constitution, indicate that this sphere of government also has a vital role to play in the realisation of socio-economic rights, and is accordingly a relevant organ of state.

The objects of local government include ensuring the provision of services to the communities in a sustainable manner, promoting social and economic development and promoting a safe and healthy environment.[42] As the rights concerning housing, healthcare, food, water, social security, education and the environment are clearly critical to the very essence of promoting social and economic development, it is contended that they would clearly fall within the ambit of the objects of local government. In addition, for example, the realisation of the right of access to sufficient water will fall within the object of ensuring the provision of services to communities.

Furthermore, section 153 of the Constitution lists the developmental duties of local government, included within which is an obligation to give priority to the basic needs of the community and promote the social and economic development of the community.[43] Regarding the actual definition of the term development, it has been argued as follows:

> "Defining the concept of development as a fixed and agreed upon phenomena is impossible and one should be wary of those who attempt to do so. It is a political, normative, and therefore subjective concept that, if unexplained, often conceals more than what it reveals. The definition of development that we opt for is one that incorporates equity and democracy as the aim of the development process and which sees it as the 'satisfaction of people's material and strategic needs'. The satisfaction of material needs equates with an improvement in the standard of living and the reduction of absolute and relative poverty. The satisfaction of strategic needs involves empowering people and enabling them to take control of their lives."[44]

42 S 152(1) Constitution.
43 S 153 Constitution.
44 Mastenbroek and Steytler 1997: 1.

Hence, if one accords the aforementioned definition to the term "development", it is clear that the realisation of socio-economic rights is both an integral component to the reduction of poverty as well as improvement in one's standard of living. It would follow that as local government has certain obligations regarding development and the realisation of socio-economic rights is fundamental to such development, that local government has an important role to play in the realisation of socio-economic rights.

Furthermore, section 153 of the Constitution obliges local government to give priority to the basic needs of the community. In making a determination as to what the basic needs of the community are, conditions conducive to the general health and well being of the individual should be key. The rights in the Constitution concerning housing, health care, food, water, social security, education and the environment are central to ensuring the health and well-being of persons. The realisation of these socio-economic rights are therefore critical to local government's mandate to give priority to the basic needs of the community. In addition, it should be noted that local government has vast powers with regard to many functional areas listed in Part B of Schedule 4 and Part B of Schedule 5 that may impact on the actual realisation of the specific socio-economic rights.[45]

For example, although housing *per se* is included in neither of these parts of these Schedules, many of the areas that relate to the adequacy of housing are included therein.[46] These areas relate to certain core factors to determining adequate housing that the UN Committee on Economic and Social Rights has noted in a General Comment.[47] These factors include legal security of tenure, the availability of services, materials, facilities, infrastructure, affordability, habitability, accessibility, location and cultural adequacy. For instance, in Schedule 4 Part B air pollution, building regulations, child care facilities, electricity and gas reticulation, municipal planning and municipal public transport all impact on the right of access to adequate housing. Furthermore, water and sanitation services, domestic waste-water and sewage disposal systems impact on the right of access to water, adequate housing and the environment. Municipal health services are also directly relevant to the realisation of the right of access to health care services.[48]

Part B of Schedule 5 also contains many areas that relate to the core factors that the UN Committee on Economic and Social Rights has outlined

45 S 156(1)(a).

46 S 26 of the Constitution makes express reference to *adequate* housing as opposed to housing *per se*. The UN Committee on Economic and Social Rights has accorded some attention to certain core factors relating to the adequacy of housing.

47 UN General Comment No 4, on *"The right to adequate housing (article 11(1) of the Covenant)"* (Sixth session 1991) UN doc E/1992/23 para 8.

48 These examples are not intended to provide a comprehensive list of *all* of the functional areas of local government that impact on socio-economic rights but rather an illustration of the fact that there are a vast number of functional areas of local government that are of significance to the enlisted socio- economic rights.

as central to the determination of adequate housing. Beaches and amusement facilities, local amenities, local sports facilities, municipal parks and recreation as well as markets are central to both the availability of services and the location of the housing. Municipal roads are important for infrastructure and cleansing, noise pollution, refuse removal, refuse dumps and solid waste disposal are central to the general habitability of a house. Finally, the control of public nuisances, the control of undertakings that sell liquor to the public, licensing and control of undertakings that sell food to the public, street trading, street lighting and traffic and parking are factors critical to the location of housing.

The substantial role of local government in the realisation of socio-economic rights is further strengthened by reference to other sources. For example, the Water Services Act[49] and the Housing Act[50] make reference to the role of local government in implementing each of these rights.

In view of the aforementioned, it is clear that local government has a vital role to play in the realisation of the socio-economic rights listed in section 184(3) and is accordingly a relevant organ of state.

In view of the numerous local governments in the country, directing requests for information to each and every local government would clearly carry with it severe cost and personnel implications for the Human Rights Commission. It is therefore suggested that the Human Rights Commission instead target the South African Local Government Association[51] (SALGA) with requests for information. SALGA is a representative structure of local government and has as one of its distinctive strengths the capacity "to act at the centre of a web of cross cutting inter-relationships between different spheres of government and different sectors of society."[52] As SALGA itself does not have a specific mandate to realise socio-economic rights, it would not constitute a relevant organ of state. However, the fact that it is a representative structure of local government, and must in terms of the Human Rights Commission Act[53] cooperate and assist the Commission where possible can be used to justify it being targeted for information on socio-economic rights. SALGA should then assume responsibility for distributing the information to the various municipalities and compiling a comprehensive local government response to the Human Rights Commission.

3.2 Any other constitutional functionary or institution

A study of the powers and functions accorded to the state institutions in Chapter 9 of the Constitution makes clear that none of these institutions

49 Water Services Act 108 of 1997.
50 Housing Act 107 of 1997.
51 S 163 of the Constitution provides for the enactment of legislation on organised local government. The Organized Local Government Act 52 of 1997 has subsequently been passed.
52 South African Local Government Association Business Plan1998: 1.
53 S 7(2) Human Rights Commission Act 54 of 1994.

have a specific mandate to realise socio-economic rights. These institutions would therefore not constitute relevant organs of state (as defined above) and cannot be targeted with requests for information in terms of the section 184(3) process. However, this does not preclude them from assisting and cooperating with the Human Rights Commission. In fact, section 7(2) of the Human Rights Commission Act obliges organs of state to assist and cooperate with the Human Rights Commission. For instance, the work of the Commission on the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities will inevitably have certain consequences in the realm of education, and it might therefore be able to provide some useful information to the Human Rights Commission. The Commission for Gender Equality should also collaborate with the Human Rights Commission on issues pertaining to gender equality and socio-economic rights. Its assistance may be of particular relevance in the context of gathering disaggregated information.

In view of the aforegoing, it is clear that the Chapter 9 state institutions, unlike national state departments, provincial governments or local government, do not have a specific mandate to realise or implement socio-economic rights. Their functions are limited to overseeing, promoting respect for human rights or gender equality, making recommendations etc, as opposed to undertaking substantive initiatives to convert the socio-economic rights in the Constitution into reality. However, as has been noted, these institutions should assist and support the Human Rights Commission in fulfilling its mandate of monitoring socio-economic rights, thereby acting as complementary bodies to the Human Rights Commission.

3.3 Any other functionary or institution

In view of the vast differences in the areas of work of parastatals, the varying extent of state funding, levels of autonomy etc, the relevance of particular parastatals to the realisation of socio-economic rights must be made individually. A blanket assessment of whether parastatals constitute relevant organs of state would be superficial as well as inaccurate. It is accordingly suggested that in making an assessment as to whether particular parastatals constitute relevant organs of state, due attention should be accorded to the relevance of their work to the realisation of socio-economic rights, the extent to which they are dependant on state funding and the extent of their affiliation to government. For example, a consideration of these factors is likely to result in the South African Housing Board and the Water Boards constituting relevant organs of state for the purposes of section 184(3). However, the challenge for the Human Rights Commission is coping with the practicalities of requesting and analysing information from the plethora of such bodies that may qualify as relevant organs of state. This issue gives rise to whether the Human Rights Commission has a discretion in the relevant organs of state that it targets for information. It is suggested that the Human Rights Commission is obliged to obtain information from the principal organs of state responsible for realising socio-economic rights. This category would for instance include the national, provincial and local spheres of government. This suggestion is further strengthened by the fact that sections 26 and 27

of the Constitution, for instance, expressly oblige the *state* to take certain measures to ensure the realisation of the rights of access to adequate housing, health care, food and water and social security. Express reference to obligations on the part of the state, illustrates the importance of the Human Rights Commission requesting information from the three spheres of government.

It is, however, contended that the Human Rights Commission be accorded some discretion in establishing the relevance of other organs of state. This category would include parastatals such as the Water Boards, the Housing Board, the Development Bank of Southern Africa etc. For instance, the fact that the Development Bank of Southern Africa promotes economic development, institutional capacity building and supports development projects and programmes in the region, indicates its relevance to the realisation of socio-economic rights. It should however lie within the discretion of the Human Rights Commission to decide whether it would qualify as a relevant organ of state for the purposes of section 184(3). This suggestion accords with a purposive interpretation of section 184(3). In examining the purpose of the monitoring of socio-economic rights in terms of section 184(3), some attention must be accorded to General Comment No 1 of the UN Committee on Economic and Social Rights.[54] Although General Comment No 1 relates to monitoring socio-economic rights under the International Covenant on Economic, Social and Cultural Rights,55 it provides some useful insight into the general purpose of monitoring the implementation of socio-economic rights. In General Comment No 1, the UN Committee has outlined the following objectives that state reporting under the International Covenant on Economic, Social and Cultural Rights seeks to achieve:

- to ensure a comprehensive review of national legislation, administrative rules, procedures and practices are undertaken;
- to ensure that the state party monitors the actual situation with respect to each of the rights and is aware of the extent to which these right are or are not being enjoyed;
- to enable the government to demonstrate that principled policy making has been undertaken;
- to allow public scrutiny of government policies and to encourage the involvement of different sectors of society in the formulation, implementation and review of relevant policies;
- to provide a basis on which the state party and the committee can effectively evaluate the progress being made in realising the right;
- to enable the state party to develop a better understanding of the problems and short comings to allow the progressive realisation of the right; and
- to allow the exchange of information.[56]

54 See General Comment No1 of the UN Committee on Economic, Social and Cultural Rights on "*Reporting by States parties*" (Third Session, 1989) UN doc E/ 1989/22 paras 2-9.

55 The International Covenant on Economic, Social and Cultural Rights is expected to be ratified by the South African government in the near future.

56 General Comment No1 of the UN Committee on Economic, Social and Cultural Rights on "*Reporting by States parties*" (Third Session, 1989) UN doc E/ 1989/22 paras 2-9.

In view of the aforementioned, it is clear that the monitoring of socio-economic rights by the Human Rights Commission should at least serve to assess and evaluate the formulation and implementation of legislation and policies and identify the gaps in ensuring the full realisation of socio-economic rights. In order to achieve these objectives, it is vital the Human Rights Commission request information from those state departments and administration that are primarily concerned with the realisation of socio-economic rights.

However, in order for the Human Rights Commission to effectively achieve the aforementioned objectives, it might not be necessary to request information from *all* the relevant organs of state. Requesting certain organs of state for information in terms of section 184(3) should accordingly fall within the discretion of the Human Rights Commission. This contention is further strengthened by section 184(3) of the Constitution not requiring the Human Rights Commission to request information from *all* relevant organs of state.

It is accordingly suggested that the Human Rights Commission is obliged to request information from the three spheres of government, given their critical role in realising socio-economic rights as well as the aforementioned purpose of monitoring socio-economic rights. However, in line with the purpose of monitoring socio-economic rights and in order for the Human Rights Commission to effectively monitor the three spheres of government, it should be accorded some discretion in requesting information from relevant organs of state that are not primarily concerned with the realisation of socio-economic rights. Furthermore, it should be noted that the latter organs of state may vary from year to year depending on the extent to which their work affects the realisation of socio-economic rights.

4 THE OBLIGATION OF RELEVANT ORGANS OF STATE TO PROVIDE THE HUMAN RIGHTS COMMISSION WITH THE INFORMATION THAT IT REQUESTS

In spite of the clarity of section 184(3) that the Human Rights Commission has a constitutional mandate to request information from relevant organs of state on the steps that they have taken in realising the stipulated socio-economic rights, it is less clear on whether the relevant organs of state are obliged to provide the Commission with the necessary information. The concern arises from the omission of an express provision regarding the obligations imposed on the relevant organs of state in the Constitution.

A duty on the relevant organs of state to provide the Human Rights Commission with information could be based on three grounds. The first is a very basic principle of the law, that for every legal right there exists a corresponding legal obligation. When applied to the issue at hand, it means that the Human Rights Commission has a constitutional power to request information from the relevant organs of state on the steps they have taken in the realisation of socio-economic rights which imposes a corresponding obligation on all relevant organs of state to provide the Human Rights Commission with such information. Second, in terms of the principles of co-operative government "all spheres of government and all

organs of state within each sphere must co-operate with one another in mutual trust and good faith by, [*inter alia*], assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest and co-ordinating their actions and legislation with one another".[57] When the section is applied to the present task, it would require that all relevant organs of state are obliged to "assist and support" the Commission, "inform and consult" with the Commission on matters of common interest as well as to "co-ordinate their actions and legislation" with the Human Rights Commission in fulfilling its task of monitoring socio-economic rights. Third and perhaps most compelling, is by reference to the Human Rights Commission Act.[58] The relevant section provides that organs of state are obliged to afford the Commission such assistance "as may be required for the effective exercising of its powers and performance of its duties and functions".

In view of the aforegoing it is clear that although the Constitution makes no express provision for relevant organs of state to provide the Human Rights Commission with information, in accordance with both, the concept of reciprocal rights and obligations in law and the principles of co-operative governance, all relevant organs of state are obliged to provide the Commission with the information that it so requests.

5 INADEQUATE REPORTS OR THE FAILURE BY RELEVANT ORGANS OF STATE TO REPORT TO THE HUMAN RIGHTS COMMISSION

Whilst the relevant organs of state do have a legal obligation to provide the Human Rights Commission with information requested, the present section will examine the options available to the Commission should they nevertheless fail to do so. Some guidance will be sought from international law in this regard as the failure of states parties to provide supervising bodies with reports has been an area of much concern in this context.

In terms of the International Covenant on Economic, Social and Cultural Rights, state parties are required to submit reports on measures that they have adopted and progress being made in achieving the observance of the rights recognised in the Covenant.[59] However, the failure of state parties to submit these reports has been a major problem facing the Committee on Economic, Social and Cultural Rights.[60] In an attempt to deal with the problem, the Committee has began notifying state parties of its intention to consider these reports at specified future sessions. Should the state party in question still fail to furnish the Committee with the report, the Committee considers the status of economic, social and cultural rights in a particular state party in the light of all available information.[61] Such information

57 S 41(1) Constitution.
58 S 7(2) Human Rights Commission Act 54 of 1994.
59 Article 16(1), International Covenant on Economic, Social and Cultural Rights.
60 The Committee on Economic, Social and Cultural Rights is the supervising body under the ICESCR.
61 UN Fact Sheet No 16 269.

normally includes information received from NGOs within that particular state party.

It is suggested that the Human Rights Commission adopt a similar approach in dealing with relevant organs of state that fail to report or submit inadequate reports. It is contended that the Human Rights Commission may exercise any of the following options or combination of options:

- It can request the relevant organ of state in question for information again and specify a time frame within which such information must be received as well as the consequences of failure to respond;
- it can report to Parliament the failure of specific relevant organs of state to respond;
- it can communicate to NGOs the failure of specific relevant organs of state to respond; and
- it can compile a report on the basis of all available information including information received from NGOs.

6 CONCLUSION

Whilst the inclusion of socio-economic rights in the South African Constitution is laudable, it must be acknowledged that critical to its success is a proper monitoring of its implementation. In undertaking this task, the Human Rights Commission faces numerous challenges. This paper has sought to address the challenge of defining a "relevant organ of state" in section 184(3) by providing a definition of the organs of state that are relevant to the realisation of socio-economic rights. However, the challenge for the Human Rights Commission lies far beyond this. It is required not only to identify these organs of state and provide them with requests for information, but also to secure their cooperation in the process in order to obtain the necessary information so as to meaningfully fulfil its constitutional mandate of monitoring the realisation of socio-economic rights.

Sources

Baxter L *Administrative Law* (1984) Juta & Co

Boulle L, Harris B and Hoexter C *Constitutional and Administrative Law* (1989) Juta & Co

Eide, "Economic, social and cultural rights as human rights" in Eide *et al* (eds) *Economic, Social and Cultural Rights: A Textbook* (1995)

Liebenberg Sandra "Identifying violations of socio-economic rights: The role of the South African Human Rights Commission" (1997) 1 *Law, Democracy and Development* 161

Mastenbroek Rudolph and Steytler Nico "Local government and development: The new constitutional enterprise" (1997) 1 *Law, Development and Democracy* 233

Matas D "Economic, social and cultural rights and the role of lawyers: Northern American perspectives" *Economic, Social and Cultural Rights and the Role of Lawyers* (1995) International Commission of Jurists