Confronting the problem of polycentricity in enforcing the socio-economic rights in the South African Constitution

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Introduction

The judicial enforcement of the socio-economic rights contained in the South African Constitution (Constitution)[1] has not been without controversy when compared to the judicial enforcement of civil and political rights. While socio-economic rights have been accorded justiciability by their express incorporation in the Bill of Rights, the courts are yet to enforce these rights in a manner that translates them into individual goods and services. The Constitutional Court approach to the enforcement of these rights has come into question particularly as the Court has rejected the concept of minimum core obligations and has failed to give the rights normative content.[2] The

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[1]Act 108 of 1996.

[2]See Bilchitz 'Health' in Woolman *et al* (eds.) *Constitutional law of South Africa* (1996) [2nd ed Original Service 2005] 56A-i; Brand 'Introduction to socio-economic rights in the South African Constitution' in Brand and Heyns (eds) *Socio-economic rights in South Africa* (2005) 1; Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for"' in Botha, Van der Walt and Van der Walt (eds) *Rights and democracy in a transformative constitution* (2003) 33; Bilchitz

Court has been admonished further for its failure to grant remedies that translate the abstract rights on paper into tangible goods and services for the majority of South Africans drowning in poverty.[3]

While the truth that socio-economic rights are justiciable rights is beyond doubt, one cannot deny the fact that these rights, by their nature, are not exactly the same as civil and political rights. The enforcement of socio-economic rights, compared to that of civil and political rights, poses far more challenges.[4] Indeed, it is evident from the current socio-economic rights jurisprudence that the Constitutional Court is grappling with a number of these challenges. In trying to translate the abstract rights into reality, the Court has also been at pains to preserve the boundaries that exist between itself and the other organs of state in accordance with the separation of powers doctrine.[5] Additionally, because poverty in South Africa is so widespread, the Court is struggling to find judicial remedies that will realise the rights not just for the individual litigants before them, but also for similarly situated persons.[6] This is in addition to addressing all interests implicit in the outcome of the case for persons who may not even be similarly situated but are affected by the case. This is where the issue of polycentricity comes into play,[7] as it is believed that socio-economic rights are more polycentric than other rights, which is why some scholars

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'Giving socio-economic rights teeth: The minimum core and its importance' (2002) *SALJ* 484; Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' 2003 *SAJHR* 1; Bilchitz 'Placing basic needs at the centre of socio-economic rights jurisprudence' 2003 4 *ESR Review* 2; Davis 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5 *ESR Review* 3; and Roux 'Legitimating transformation: Political resource allocation in the South African Constitutional Court' 2003 10 *Democratization* 92.

[3]Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) *SAJHR* 301; Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' 2002 *LDD* 159; Swart 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' 2005 *SAJHR* 215; and Pillay 'Implementation of Grootboom: Implications for the enforcement of socio-economic rights' 2002 *LDD* 225.

[4]See De Vos 'Pious wishes or directly enforceable rights?: Social and economic rights in South Africa's 1996 Constitution' 1997 *SAJHR* 71.

[5]Pieterse 'Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience' 2004 *Human Rights Quarterly 903*.

[6]Motala and Ramaphosa *Constitutional Law: Analysis and cases* (2002) 34. See, for instance, the case of *Khosa v Minister of Social Development* 2004 6 BCLR 596 (CC), rejected an out of court settlement as it would not solve the underlying constitutional challenge and would not benefit similarly situated people.

[7]S 3 below.

doubt their practical justiciability.[8] In contrast, civil and political rights are promoted as justiciable; they are 'comprehensible because they involve discrete clashes of identifiable individual interests'.[9] Indeed, it is believed that the polycentric nature of socio-economic rights, amongst others, explains the interpretative approach of the Constitutional Court towards these rights.[10]

The purpose of this paper is to highlight the problem of polycentricity in socio-economic rights litigation and to show how the courts could respond to it. It is easy for one to discard the objections to the constitutional protection of socio-economic rights outlined during certification of the Constitution.[11] However, finding remedies for the violation of these rights when confronted with the problem of polycentricity cannot be done with similar ease. The courts, therefore, should not be oblivious to the problem of polycentricity when enforcing socio-economic rights. Rather, the courts should appreciate the polycentric nature of these rights and devise appropriate responses thereto. The paper begins by understanding polycentricity as defined by Fuller.[12] This is followed by an examination of the polycentric nature of socio-economic rights and its impact on their enforcement. While Fuller's objection to the adjudication of socio-economic rights will be critiqued at this stage, the paper nevertheless takes into account a number of Fuller's proposals on how adjudicators might overcome the problem of polycentricity.

Fuller's definition of polycentricity

The problem of polycentricity in adjudication is deduced from the writings of Fuller,[13] in which he set out to answer two broad questions. The first question is 'what kinds of social tasks can properly be assigned to courts and other adjudicative agencies?'[14] Here, Fuller's objective is to define the dividing line between social tasks

[8]See Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard LR* 353; and Davis 'The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles' (1992) *SAJHR* 475.
[9]Scott and Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *Univ of Pennsylvania LR* 24.
[10]See Pieterse *A benefit-focused analysis of constitutional health rights* PhD thesis submitted to the University of Witwatersrand [December 2005] 128.
[11]See *In re Certification of the Constitution of the Republic of South Africa* (*First Certification case*) 1996 10 BCLR 1253 (CC).
[12]Fuller (n 8).
[13]*Ibid*.
[14]*Id* 354.

and those tasks that require an exercise of executive power. With this objective in mind, Fuller examines the underlying assumption that certain problems are inherently unsuited for adjudicative disposition and should be left to the legislature. The second question Fuller sets out to answer relates to the different forms of adjudication and deviation from those forms. Specifically, he considers the benefits and dangers of deviating from the ordinary forms of adjudication; are there permissible variations beyond which one would speak of abuse or perversion?[15] However, before examining Fuller's answers to these questions, let us turn first to his definition of adjudication.

In Fuller's opinion, adjudication means more than settling disputes or controversies. Instead, 'adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated'.[16] According to Fuller, even in the absence of formalised doctrines such as *res judicata* or *stare decisis*, an adjudicative determination will always enter in some degree into the litigant's future relations and into the relations of other parties who see themselves as possible litigants before the same tribunal. Such parties will conduct themselves in a way that avoids such litigation. This is the nature of the social ordering influence that adjudication possesses.[17] Fuller submits that what distinguishes adjudication from other forms of decision-making is the form of participation allowed to the parties in the decision-making process. He views adjudication as guaranteeing the parties a right to formal and institutional participation in the decision-making process. This is because the parties are assured the right of audience to present proofs and reasoned arguments.[18]

While Fuller acknowledges the fact that other forms of decision-making processes may also allow for such participation, this is not guaranteed as a right. The decision-maker is not obliged to listen to the parties and may ignore their arguments, whether or not they are reasoned.[19] Fuller gives the example of a political speech during an election. There is no affirmative right that the campaigner will have the opportunity to give a reasoned speech, and even when this right is guaranteed, there is no formal assurance that anyone will listen to the speech, let alone act on its reasoned arguments. In Fuller's

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[15] *Ibid*.
[16] *Id* 357 and 380.
[17] *Id* 357.
[18] *Id* 365.
[19] *Id* 366.

opinion, a party in the process of bargaining the terms of a contract is in no better a position. In contrast, the adjudicator is obliged to listen to the proofs and reasoned arguments of the parties and to take them into account when making his/her decision. The duty to consider the arguments of the parties places a demand of rationality on the adjudicator, which is not expected of other decision-makers.[20]

The absence of meaningful participation due to impossibility, in Fuller's opinion, may place some tasks beyond the limits of adjudication. He cites polycentric tasks as an example of tasks which may make meaningful participation impossible.[21] A polycentric matter is one in respect of which a decision would have unforeseen and wide repercussions affecting a multitude of parties (not necessarily similarly suited parties), sometimes not before the court. Yet, every subtle adjustment would have grave unforeseen repercussions.[22] Fuller contends that the range of people affected by a decision of a court is not foreseen easily. As a result, the participation of people with such diverse interests cannot be organised. The adjudicator is inadequately informed and cannot determine the repercussions of the proposed solution.[23] He gives the example of the tasks of players in a football team. Each shift of position by one player has a different repercussion for the other players. He also compares polycentric tasks to a spider web a pull on one strand will distribute tensions after a complicated pattern through the web as a whole. Doubling the original pull will not simply double each of the resulting tensions but will rather create a complicated pattern of tensions. He describes this as a polycentric situation, because it is multi-centered, with each intersection of the strands becoming a distinct centre for distributing tensions.[24] Along the same lines, Currie & De Waal define polycentric tasks as those matters which entail the co-ordination of mutually interacting variables and a change in one variable will produce changes for other variables.[25]

The courts, unlike administrative authorities, may not have in their possession large amounts of information to guide their decisions.[26] The

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[20]*Id* 366-367.
[21]*Id* 364.
[22]See Pieterse (n 10) at footnote 124.
[23]*Id* 395.
[24]*Id* 394.
[25]Currie and De Waal *The new constitutional and administrative law* (2001) 569.
[26]Abramovich 'Courses of action in economic, social and cultural rights: Instruments and allies' 2005 2 *SUR – International Journal on Human Rights* 183.

courts, either due to the limited resources of the parties or as a result of their own rules, may be limited to the information provided in evidence.[27] Such evidence may not adequately reflect the many competing interests implicated by the case. One of the reasons why all affected parties cannot be made party to the litigation is because of logistics. This includes not only the logistics available to the parties, but also the resources placed at the disposal of the court for that purpose.[28] Consequently, many complex policy issues remain unaddressed by the court, with unexpected repercussions which could make the decision unworkable. In Fuller's opinion, the unworkable decision is either ignored, withdrawn or modified, sometimes repeatedly, making it hard to enforce and observe.[29]

In *Minister of Health v Treatment Action Campaign*[30] the Constitutional Court indicated that it was alive to the problem of the polycentric interests embedded in socio-economic rights litigation. It held that courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.[31] This consciousness could be used to explain the Court's reluctance to define a minimum core for the right of access to adequate housing; a definition of a minimum core would have involved the Court in 'a utilitarian calculus of social and economic advantage of a decision in a context of a myriad of competing claims which are not before the Court'.[32] In *Government v Grootboom*,[33] the Court said that determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions because the needs are diverse: there are those who need land; others need both land and houses; yet others need financial assistance'.[34] According to the Court, it is not possible to determine the minimum threshold without first identifying the needs and opportunities for the enjoyment of such a right. The Court said that these will vary according to such factors as income, unemployment, availability of land and poverty. The differences between city and rural

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[27]Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' 2004 *SAJHR* 393. See also Lenta 'Judicial restraint and overreach' 2004 *SAJHR* 545.
[28]Pieterse *id* 393.
[29]Fuller (n 8) 401.
[30]2002 5 SA 721 (CC) (*TAC* case).
[31]Para 38.
[32]Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' 2006 *SALJ* 271.
[33]2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) (*Grootboom* case).
[34]Para 33.

communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. The Court said that, unlike the United Nations Committee on Economic, Social and Cultural Rights,[35] it did not have access to the information that would enable it to define the minimum core.[36]

Polycentricity in socio-economic rights

Socio-economic rights cases are believed to be polycentric in nature, firstly, because of the conception that they have budgetary consequences.[37] It is submitted that each decision to allocate a particular sum of money for a specified purpose implies less money for other purposes.[38] According to Davis, a case involving a person's right to a house would not only impact on that person and the state, but also on interests of other citizens. The interests of other citizens would raise questions such as whether the money should be used to build a crèche, a hospital or a sports stadium.[39]

It has also been submitted that socio-economic rights are logically linked to collective rather than individual claims, yet courts are ill-suited to adjudicate collective claims because they give rise to a multiplicity of interests.[40] For instance, consider a case in which a court orders that the

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[35]This is the Committee which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights. This Committee, in one of its General Comments, has interpreted the Covenant as giving rise to a minimum core obligation on the state to realise at least the minimum socio-economic needs of everyone. See Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of States parties' obligations* (5th session, 1990) UN Doc E/1991/23, annex III at 86 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev 6 at 14 (2003).

[36]Paras 32.

[37]Budgets, it is believed, are finite in nature and have a multitude of ways in which to be distributed. See Pieterse (n 27).

[38]O'Regan 'Introducing socio-economic rights' 1999 1 *ESR Review* 2. Currie and De Waal (n 25) 570, give the case of *Soobramoney v Minister of Health* 1998 1 SA 765 (CC) (*Soobramoney* case) as an example of a polycentric case. According to Currie and De Waal, if the Constitutional Court had decided that Soobramoney was entitled to dialysis treatment the decision would not only have affected the individual, but also the complex web of mutually interacting resource allocations.

[39]Davis (n 3) 478.

[40]See Viljoen 'The justiciability of socio-economic and cultural rights: Experience and problems' (2005) [Unpublished paper on file with author] 40.

government provides medical treatment to the applicants because they cannot afford it. This case would have an impact on many other patients not before the court, but who could also qualify for the treatment on the same basis as the litigant. However, the medical needs of patients are different. Some may not afford the primary care necessary for their needs while others, though economically well placed, may not afford tertiary medical care such as kidney or heart transplants.[41]

In relation to the *Soobramoney* case,[42] it has been submitted that it would have been senseless to extend expensive treatment to Mr Soobramoney 'at a time when many poor people … had little or no access to any form of even primary health care services'.[43] In this case a patient suffering from chronic renal failure without any chances of recovery had laid claim to dialysis treatment at a public hospital on the basis of his section 11 Constitutional right to life. This was in addition to his right not to be denied emergency medical treatment.[44] The Constitutional Court upheld the state's submission that the medical resources were constrained and that the hospital was justified to exclude patients from dialysis treatment if they had no chance of recovery in order to use the resources for those who would recover. According to the Court, 'if treatment has to be provided to the appellant it would also have to be provided to all other persons similarly placed'; yet 'the cost of doing so would make substantial inroads into the health budget'. The Court also outlined the repercussions of a decision that the applicant must receive the treatment: it would involve additional expense to pay the clinic personnel at overtime rates or to employ additional personnel working on a shift basis; and it would also put a great strain on the existing dialysis machines which are already showing signs of wear. Yet it was estimated that the cost to the State of treating one chronically ill patient by means of renal dialysis provided twice a week at a state hospital is approximately R60 000 per annum.[45]

Fuller contends that although other forms of adjudication may be polycentric, what the adjudicator needs to know is when the polycentric elements have become so significant and predominant

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[41]See Bilchitz 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' 2006 7 *ESR Review* 2.
[42]*Soobramoney* case (n 38).
[43]De Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' 2001 *SAJHR* 259–260.
[44]S 27(3).
[45]Para 28.

that the proper limits of adjudication have been reached. He submits that socio-economic rights take the courts to such limits, at which point they are required to abstain from adjudicating these rights.[46]

However, while there is no doubt that socio-economic rights are polycentric, one could still argue that the problem of polycentricism is alive in all forms of constitutional litigation. Fuller concedes that all disputes that come before the courts have either explicit or concealed polycentric effects.[47] Yet this does not render litigation illegitimate;[48] indeed, it could be argued that civil and political rights, like socio-economic rights, are polycentric in nature.[49] It is true that a petitioner in a constitutional case, whether involving civil and political rights or socio-economic rights, may be motivated by personal or private interests. In spite of this, the decision of the court usually has a wide impact and may affect many people.[50]

Examples of disputes based on civil and political rights will offer more clarity. Consider a case in which the issue is the extent to which an attorney's right to privacy may be limited. The case will have repercussions not only for the particular attorney and his clients, but for hundreds, or even thousands, of other attorneys and their clients. This is because the case may establish a precedent that binds future disputes. Another example is a case involving the freedom of association or trade union rights; such a case may have multiple repercussions for parties other than the litigating union and specific employer. The decision will have implications for all members of the particular union, members of other unions and employers in the same or similar industries. The same could be said of an order in a criminal trial, which may also force the National Prosecuting Authority to employ and pay more investigators thereby leading to budgetary adjustments. This may have multiple repercussions. However, simply because the multitudes of affected persons are not in court will not stop adjudication of the dispute. The mere fact that a court cannot deal with many or all of the aspects of a

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[46]Fuller (n 8) 401.
[47]*Id* 401.
[48]Sturm 'A normative theory of public law remedies' 1991 79 *Georgetown LJ* 1355
[49]O'Regan (n 38); and Pieterse (n 10) 128.
[50]Cassels 'An inconvenient balance: The injunction as a Charter remedy' in Berryman (ed) *Remedies, issues and perspectives* (1991) 302. Cassels also submits that constitutional litigation is not simply a bipolar contest between private interests; instead, it represents itself as a battle for the very meaning of public interest and has the character of a class action (at 304). See also generally Chayes 'The role of the judge in public law litigation' (1979) 89 *Harvard LR* 1281.

case does not mean that it deals with none.[51] Epstein uses the analogy of an auditor simply because an auditor cannot correct every abuse in a department's procurement policies does not mean that he should not go after a $5000 coffee pot.[52] In the case of *August v Electoral Commission*,[53] the Constitutional Court observed that '[w]e cannot deny strong actual claims timeously asserted by determinate people because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups.'[54]

It is also important to note that policy formulation and legislative processes are not immune from polycentric repercussions.[55] In the first place, one cannot assert, too strongly, that the legislative or executive processes are representative of all the interests particularly on issues of policy formulation and implementation.[56] Those who are not politically organised, and in most cases the impoverished, may find it hard to make their voices heard in the political processes. In addition, legislation and policy are usually designed and adopted in the abstract, and implemented without first having been tested on practical problems. The courts, in contrast, stand in an advantageous position. While their decisions may have polycentric repercussions, they deal with real problems never anticipated by policy makers and legislators.[57] Such cases before the courts should alert the authorities to the widespread nature of socio-economic problems which may either have been ignored or not contemplated.[58]

The *Grootboom* case is a good example of a judgment that alerted the authorities to the widespread nature of the problem of lack of access to adequate housing by many desperate people. The Constitutional Court indicated that it was aware of the intolerable conditions under which

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[51]Pieterse (n 27) 394. See also Scott and Alston 'Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' 2000 *SAJHR* 242.

[52]Epstein 'Judicial review: Beckoning on two kinds of error' 1985 *Cato Journal* 716

[53]1999 4 BCLR 363 (CC).

[54]*Id* para 30.

[55]According to Fiss 'Foreword: The forms of justice' (1979) 93 *Harvard LR* 43, virtually all public norm creation is polycentric because it affects as many people as structural reform litigation and equally impairs the capacity of each affected individual to participate. Additionally, more often than not, there is a myriad of possible remedies that could be formulated.

[56]Chayes (n 50) 1311.

[57]Pound *The formative era of American law* (1939) 45, as quoted by Horowitz *The courts and social policy* (1977) 3. See also Pieterse (n 27) 395.

[58]Abramovich (n 26) 195. See also Viljoen (n 40) 41.

many people are still living and that the respondents were but a fraction of them.[59] The declaration of the Court that the government's housing programme was unreasonable has since inspired litigation and policy revision in the area of housing rights.[60] The Court's ruling that government's housing policy was unreasonable for failure to provide for the needs of those in desperate need prompted government to adopt an emergency housing policy.[61] When such policies are adopted, they will have wide application and benefit all people in situations similar to that of the litigant(s).

Confronting polycentricity

Fuller's approach is backed by forms of litigation based on the notion of corrective justice. Unlike distributive justice, the notion of corrective justice focuses on the individual litigant before the court and is aimed at restoring such litigant to the position he/she would have been in had the violation not occurred.[62] Courts making decisions based on this theory ignore the impact of their remedies on interests other than those of the litigating parties. In addition to ignoring the interests of similarly situated

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[59]Para 2.

[60]See *President v Modderklip Boerdery* 2005 8 BCLR 786 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) ; *City of Cape Town v Neville Rudolph* 2003 11 CLR 1236 (C); *Jaftha v Schoeman* [2003] 3 All SA 690 (C); and *City of Johannesburg v Rand Properties* 2006 6 CLR 728 (W).

[61]National Department of Housing, *Part 3*: *National Housing Programme*: *Housing Assistance in Emergency Circumstances* April 2004; sourced at http://www.housing.ov.za/Content/legislation policies/ Emergency%20%20Housing%20Policy.pdf (accessed 2005-11-29). The policy acknowledges the fact that it was adopted as a direct response to the Constitutional Court's ruling that the existing programme was unreasonable (5). See also the Centre for Study of Social Policy's report, *New roles for old adversaries: The challenge of using litigation to achieve system reform* (January 1998) available at htt://www.cssp.org/uploadFiles/New for-old adversaries .pdf> (accessed 2005-11-30). This report notes that a judicial decree can spotlight the worst abuses and galvanise public attention thereby producing short-term gains in funding for more services. The report contends further that class action litigation can serve to spark and sustain real institutional change in deeply troubled jurisdictions. It can force agencies to acknowledge the magnitude of the problem and pay attention to resolving it (3).

[62]Shelton *Remedies in international human rights law* (1999) 38. See also Roach *Constitutional remedies in Canada* (1994) 3-2; Weinrib 'Corrective justice in a nutshell' (2002) 52 *Univ of Toronto LJ* sourced at http://www.utpjournals.com /product/utlj/524/524 weinrib.html (accessed 2006-06-22). See also Modak-Truran 'Corrective justice and the revival of judicial virtue' (2000) 12 *Yale Journal of Law and Humanities* 252; and Keating 'Distributive and corrective justice in tort law of accidents' 2000 *Southern California LR* 193.

people they fail to appreciate and engage with the multiple repercussions of their decisions. Such courts are therefore not interested in engaging the problem of polycentricity.

In contrast, the notion of distributive justice is aimed at redressing legal wrongs not only for the benefit of the litigating parties, but also for similarly situated persons.[63] A court basing its decision on the theory of distributive justice may decline to put a litigant in a position he/she would have been in had the violation not occurred if this would affect other legitimate interests. Polycentricity comes alive here because the court must try to understand the wide range of interests involved in the case and appreciate the polycentric repercussions of any decision it makes.[64] In this regard, when faced with a socio-economic rights case, the court's focus will go beyond the interests of the individual litigant(s). With this approach, while there may be a risk of opening the floodgates,[65] the court's objective is to maximise the benefit of the remedy which conversely helps to close the floodgates. This is in addition to awarding remedies whose implementation would not be hampered by polycentric interests. Indeed, there is always a danger that if all concerned or those with similar interests are not invited to participate in that remedial process they may reject and block the implementation of the remedy:[66]

> When those excluded complain, often justifiably, that their position has not received a fair hearing, political as well as bureaucratic obstacles to implementation are often created. Thus, in order to minimize opposition to implementation, it is advisable to invite the participation at the decree formulation stage of relevant non-parties.[67]

It is also true that unless the state is convinced that the implementation of the remedy would not disrupt its programmes towards similarly situated persons it may shun the remedy by refusing to implement it.

While polycentricity does not disqualify socio-economic rights from judicial protection, it presents a problem that needs to be tackled. To resolve polycentric tasks, Fuller proposes a new form of adjudication which he refers to as 'mixed form adjudication'.[68] By 'mixed form

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[63]Cooper-Stephenson 'Principle and pragmatism in the law of remedies' in Berryman (n 50) 19.

[64]Roach 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona LR* 859.

[65]See Pieterse (n 10) 129.

[66]Note 'Implementation problems of institutional reform litigation' (1998) 91 *Harvard Law Review* 433 [no authors cited by the journal].

[67]*Id* 440.

[68]Fuller (n 8) 396.

adjudication' Fuller means 'a mixture of adjudication and negotiation'.[69] To drive his point home, Fuller uses the example of a labour dispute arising from an agreement to make salary adjustments with multiple variables which would not only benefit but affect all employees and the employer. To resolve this dispute, Fuller proposes the use of a 'tripartite' arbitration board. Such an arbitration board would be constituted by an impartial chairman who is flanked by two fellow arbitrators. One of the two arbitrators would be selected by the employer and the other by the labour union. The arbitration board would reach its decision unanimously after mutual consultation not only amongst its members but also with the parties. The two arbitrators appointed by the union and the employer respectively will be alive to the interests of the party they present and will bring their experience to bear upon the decision. However, to counter the problem of extending the failed negotiations into the arbitration process, the objectivity and neutrality of the chairman will become useful. The impact of this process is that it will result in a decision which has taken into account all the interests and is likely to be accepted by all the parties.

In my opinion, this form of mixed adjudication will enable the arbitration body to be informed of interests that would have not been brought to light had the process not had a tripartite character. This will educate the tribunal on all the repercussions that the decision is likely to have on the parties and all directly implicated interests. In addition, it will produce a result that is acceptable to all the parties because of the degree of participation in the remedy selection process. Participation will bring to light the obstacles likely to be encountered and, without surprise, clarify the remedial obligations of the parties in a cooperative manner. This makes implementation of the decision easy and forestalls resistance when the time comes to assume the remedial obligations.

Mixed adjudication should be contrasted with adversarial litigation. Adversarial litigation processes may not provide the opportunity for consideration of all interests implicated by a case.[70] Yet, 'lawyers' control over the process in adversarial litigation tends to detract from the client's sense of autonomy and responsibility'.[71] As a result, the ruling emanating from such 'winner-takes-all' litigation will not take into consideration interests and arguments not presented before the court.[72]

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[69] *Ibid.*
[70] Currie and De Waal (n 25) 569.
[71] Sturm (n 48) 1394.
[72] Currie and De Waal (n 25) 569.

This is because the 'win-lose' character of the adversary process prevents the exchange and integration of multiple perspectives necessary to produce an effective remedy.[73]

To avoid grappling with the problem of unforeseen repercussions when implementing remedies in socio-economic rights litigation, therefore, one would advocate for non-adversarial litigation. However, this is not to suggest that adversarial litigation should not play any role in the adjudication process. Fuller goes to great lengths to demonstrate the advantages of adversarial litigation. In Fuller's opinion, 'an adversary presentation seems the only means for combating '[the] human tendency to judge too swiftly in terms of the familiar, that which is not yet fully known'.[74] Fuller is of the view that judicial decision-makers are susceptible to making quick conclusions about situations and then later applying these conclusions consistently to seemingly similar situations:

> What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is wanting for the case and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence … But what starts as a preliminary diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.[75]

Fuller contends that the arguments of counsel, and the preparations they make, render it possible to explore all the peculiarities and nuances of the case. Additionally, the preparation process leads to a preliminary analysis of issues which gives the hearing form and direction.[76] He adds that the exchange of written pleadings between the parties will greatly reduce the dispute. In addition, the process gives adjudication integrity by allowing the parties, through their representatives, to present facts and issues through legal proofs and arguments. Fuller contends further that the adjudicator also gains confidence in reaching his decision on the basis of arguments and proofs provided by the parties.[77]

Similarly, Shaibani submits that some forms of litigation, including constitutional law cases, 'are likely to stir emotional and idiosyncratic

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[73]Sturm (n 48) 1395.
[74]Fuller (n 8) 382.
[75]*Id* 394.
[76]*Id* 383.
[77]*Id* 383-384.

reactions in the participants'.[78] However, through adversarial litigation the parties will be able to resolve their disputes in an environment where emotions can be controlled, which reduces the chances of undesirable confrontation. The parties will therefore be able to express their aggression without physical fights.[79]

In spite of its advantages, however, adversarial litigation also has its disadvantages. Adversarial litigation is time consuming, expensive, and it emphasises the differences between the parties in a way that maximises the sense of conflict.[80] Adversarial litigation is also individualistic, in the sense that evidence is gathered to support the respective parties' arguments and interests.[81] When the court adopts an adversarial style of litigation it has to rely on the parties providing all the relevant information. This means that there may be many unanswered or unexplored issues and questions because the parties will be selective in the information they present. In contrast, a more inquisitorial approach might allow the court to satisfy itself that it has all the relevant information needed to reach a decision.[82] This would allow the court to adequately consider all the reasonably foreseeable interests affected by the case and which the court is reasonably able to address.

It is my submission that a non-adversarial style of litigation would, while maintaining the advantages of adversarial litigation, minimise its disadvantages. Such a non-adversarial style would be akin to what Fuller has described above as 'mixed adjudication' combining both adjudication and negotiation. In addition to Fuller's mixed form adjudication other forms of non-adversarial litigation could be used in order to allow for attention to issues and interests that would otherwise not be addressed in adversarial litigation. This form of adjudication would be aimed at ensuring maximum participation of all the parties, and sometimes affected non-parties, in the decision-making process and in the design and implementation of the remedy. This is in addition to fostering dialogue between the courts and the

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[78]Shaibani 'Psychodynamics of the judicial process' (1999) 1 *Standford Journal of Legal Studies* 2.

[79]*Id* 3.

[80]Moore 'Community conferencing as transformative problem solving' (2000) 24 *Spider news* 1.

[81]Brent, Marshall, Picou and Schlichtman 'Technological disasters, litigation stress and the use of Alternative Dispute Resolution mechanisms' 2002 *Law and Policy* 290. See also generally Chayes (n 50).

[82]See Australian Law Reform Commission (ALRC) Issue Paper 22 *Review of the adversarial system of litigation: Rethinking family law proceedings* para 5.4.

other branches of state. This will promote inter-institutional relations that will facilitate the realisation of the rights by leading to effective and well received remedies.[83]

Indeed, it is also at the level of remedies where the greatest potential lies for forging inter-institutional relations, which will help bring about relief that is both effective and legitimate in the eyes both of the litigants and of society at large.[84] The court, while declaring that there is a violation and directing its remediation could still leave some matters open for discussion between the parties. The court could also order that persons not party to the suit but with interests that may be impacted on by the case be consulted. A good example of a case where this approach may be relevant is when, for instance, the remedy has implications for other spheres of government not originally party to the suit. It is always very hard for one sphere of government to discharge its socio-economic rights obligations without the co-operation of other spheres. This is because of the sometimes overlapping competences of government and the enforced spirit of co-operation and interdependence.

Indeed, the use of non-adversarial forms of litigation including mediation in socio-economic rights litigation is increasingly gaining support,[85] especially within the context of promoting institutional dialogue.[86] In the case of *Port Elizabeth Municipality v Various Occupiers*,[87] Sachs J, for instance, emphasised the benefits that mediation would bring in constitutional litigation. He said that:

> Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By

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[83]Pieterse (n 27) 406 and 411-412 views adjudication as a manner of building a pragmatic notion of inter-institutional cooperative interaction.

[84]Scott and Alston (n 51) 224. Sachs has emphasised the need for dialogue between the different branches of government to be civil in tone and reasonable in substance. In Sachs' view, courts view themselves as being not in a contestationary relationship with government, but in a constitutional conversation. Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in Peris and Kristian (eds) *Democratising development: The politics of socio-economic rights in South Africa* (2005)151.

[85]See, eg, Abramovich (n 26). See also Sabel and Simon 'Destablization rights: How public interest litigation succeeds' 1999 *Harvard LR* 1; Scott 'Towards a principled, pragmatic judicial role' (1999) 1 *ESR Review* 6; Vikas 'Social change and public interest litigation in India' (2005) *Independent Media Centre*, India, sourced at htt://www.india.indymedia.org/en/2005/03/210205.shtml (accessed 2005-11-30); Scott and Alston (n 51); Van Bueren 'Alleviating poverty through the constitutional court' 1999 *SAJHR* 52; and Pieterse (n 27) 396.

[86]Scott *ibid*. See also Scott and Alston (n 51) 223-224.

[87]2005 1 SA 217 (CC).

> bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways around sticking-points in a manner that the adversarial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we live in a shared society.[88]

It should also be noted that non-adversarial forms of litigation not only make it possible to tackle polycentric tasks, they reduce the tensions between the court and other organs. The court will not be perceived by the other organs as imposing obligations on them, instead it will be seen as facilitating dialogue between the parties. It should be noted, however, that the successful use of this form of litigation is very much dependent on whether the parties are willing to participate in it in good faith. Its success is therefore not entirely dependent on the court, but also on the attitude of the parties. Dialogue, cooperation and collaboration are voluntary and cannot be imposed upon a person with a negative attitude.

Widened 'locus standi' to accommodate polycentric interests

As demonstrated above, Fuller's theory of polycentricism was conceived with reference to private law litigation and is based on the notion of corrective justice. Fuller's theory does not take into account the complexities of modern public law litigation. This form of litigation has become very complex and often involves a number of interests meriting legal protection. Under a legal duty to protect human rights, modern courts have resorted to distributive justice methods of litigation that deviate substantially from the traditional forms. The social realities are that our social existence is now defined by large-scale organisations, particularly government bureaucracies and that to insist on adjudicative methods that ignore these realities is a mistake.[89] As seen above, Fuller's main concern with socio-economic rights litigation is that it does not guarantee participation by all the interests concerned. However, Fuller fails to explore ways to bring on board the participation, as much as is reasonably possible, of all those affected by a case.[90]

In constitutional litigation, a court may confront polycentric

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[88]Para 42.
[89]See Sturm (n 48) 1387-1388.
[90]Sturm (n 48) 1391.

challenges by involving a wide range of parties in the resolution of the dispute.[91] In fact, at the disposal of the courts are several procedures that allow judges to invite participation by all persons affected by a case. A judge could order the issuance of third party notices to people he/she thinks may be affected by a decision. In addition to this, the judge may appoint a *guardian ad litem* to represent absentee interests.[92] In modern constitutional states, constitutional litigation is often complemented by provisions widening *locus standi*, which opens up the process of litigation to a greater number of interested parties. This is the spirit of section 38 of the Constitution,[93] which widens the *locus* beyond the confines of the common law.[94] The Constitutional Court has embraced the spirit of this section fully by allowing access to the courts to a variety of people who in traditional terms would not have had audience. The Rules of the Court allow any person who is entitled to join the proceedings to apply for leave to intervene at any stage of the proceedings.[95] The Rules also allow for the participation as *amici curiae*: 'any person interested in any matter before the Court'.[96] This rule has been used mainly by public interest groups, human rights advocates and academic research institutions to promote the interests of marginalised groups and to suggest interpretations of the human rights provisions in the Constitution. Examples of such groups in socio-economic rights litigation include the Legal Resource Centre, Treatment Action Campaign, the Community Law Centre at the University of the Western Cape and the Center for Applied Legal Studies at the University of Witwatersrand.[97]

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[91]See Fiss (n 55) 40.

[92]Chayes (n 50) 1312.

[93]S 38 allows the following people to approach the courts in constitutional matters: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.

[94]The common law is very strict on the question of who may approach the court to enforce a right. It is only those with a direct interest in the case or deriving interest from the parties that may be joined in litigation.

[95]Rules of the Constitutional Court, promulgated under GN R1675 in *GG* no 25726 2003-10-31, rule 8(1).

[96]Rules of Court, rule 10.

[97]On the role that such organisation may play see Heywood 'Shaping, making and breaking the law in the campaign for National HIV/AIDS Treatment Plan' in Peris and Stokke (n 84) 181.

Chaskalson J, in *Ferreira v Levin NO,*[98] held that the Court should rather adopt a broader approach to standing.[99] This would be consistent with the mandate given to the Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled. In *Ngxuza v Department of Welfare, Eastern Cape,*[100] the applicants' disability grants had been suspended without due process of law. They brought an action on their own behalf and on behalf of others in a similar position that numbered over 100,000. Relying on section 38, the Court rejected the objection that the applicants did not have standing. The Court said that the practical difficulties associated with representative and class actions could not justify denial of such action when the Constitution made specific provision for it.[101] According to the Court, a flexible and generous approach was called for to make it easier for disadvantaged and poor people to approach the courts on public issues and to ensure that the public administration adhered to the fundamental constitutional principle of legality in the exercise of public power.[102] This decision was confirmed by the Supreme Court of Appeal in *Department of Welfare v Ngxuza*.[103]

The involvement of a number of parties in the litigation will bring into perspective interests which the main parties have not considered. This will enable the court to make decisions that do not adversely affect such other interests. This does not, however, mean that all interests will be brought to light;[104] rather it plays a very important minimising role and may provoke inquiry into the impact of the decision on interests not directly implicated. Though the judge must be certain that the full range of interests is represented he/she should not fail in his/her duty to protect a right simply because every affected individual cannot meaningfully be represented.

Conclusion

The problem of polycentricity is more acute in socio-economic rights litigation than in other forms of litigation. This is because, by their nature, socio-economic rights implicate collective interests and require

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[98]1996 1 SA 984 (CC).
[99]Para 165.
[100]2001 2 SA 609 (E).
[101]*Id* 1331.
[102]*Ibid.*
[103]2001 10 BCLR 1039 (A).
[104]Fiss (n 55) 40.

a careful distribution of resources. This is especially visible in countries that have wide income inequality gaps such as South Africa. However, this does not mean than civil and political rights are not polycentric. The difference lies in degree and in the fact that socio-economic rights, generally speaking, require far more positive action to realize and are mainly violated by failure to provide.[105] In a context of widespread poverty the problem becomes very real as courts have to see to it that resources, while being applied to meet the positive needs of individuals, should not compromise other equally legitimate interests.

It should also be noted that the notion of polycentricity strengthens the position of those who oppose the justiciability of socio-economic rights on the ground that these rights involve the redistribution of resources, a task for which courts are ill-suited.[106] However, I have demonstrated here that the problem of the polycenticity of socio-economic rights, which is also true of civil and political rights, should not affect the justiciability of these rights. In spite of this, I have argued that this does not mean that polycentricty does not present a problem that courts need to attend to when they search for remedies for violations of these rights. The courts should open the litigation to as many interested persons as is reasonably possible by employing flexible rules of standing. This is in addition to adopting non-adversarial styles of litigation in order to converse all issues and appreciate, as much as is reasonably possible, all interests implicated by the case.[107]

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[105]See De Vos (n 4). According to Abramovich (n 26)183, civil and political rights differ from socio-economic rights more in matter of degree than in any substantial way, and that the most visible features of socio-economic rights are the obligations 'to do'.

[106]See Scott and Macklem (n 9); Bossuyt 'International human rights systems: Strengths and weakness' in Mahoney and Mahoney (eds) *Human Rights in the twentieth century*. (1993); Cranston 'Human rights real and supposed' in Raphael (ed) *Political theory and rights of man* (1967); Cranston *What are human rights?* (1973); and Robertson 'Economic, social and cultural rights: Time for a reappraisal' *New Zealand Business Roundtable* September 1997. First published in 1997 by New Zealand Business Roundtable, Wellington, New Zealand, sourced at http://www.nzbr.org.nz/ documents/publications/publications-1997/nzbr-rights.doc.htm (accessed 2005-01-23).

[107]See Allison 'Fuller's analysis of polycentric disputes and the limits of adjudication' 1994 *Cambridge LJ* 367.