

A Future of Justice Inclusion: Examining Access to Justice in South Africa through the ‘Ethic of Care’ and ‘Complexity’

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Abstract

In South Africa, a number of obstructions exist to realising the right to access to justice as enshrined by section 34 of the South African constitution. Globally, many countries grapple with access to justice due to a number of multi-layered and complex causes. This article explores traces, connections, definitions and perceptions related to access to justice so as to allow for a deeper understanding of persisting justice problems. It employs a multi-disciplinary approach that examines worldviews on access to justice in South Africa through the lens of what Sohail Inayatullah terms ‘other ways of knowing’. These worldviews are also considered through the framework of the ‘ethic of care’ as formulated by Carol Gilligan and connected to the notion of ‘complexity’ as understood by Yvonne Malan and Paul Cilliers. The worldviews explored represent ‘different voices’ that discloses a possibility for a future of justice inclusion. The article calls for a people-centred approach to access of justice, underpinned by notions of humility, complexity, concreteness, and particularity.

Keywords: access to justice, South Africa, people-centred approach, ethic of care, complexity, complex systems, other ways of knowing

1 Introduction

In this article, we aim to contribute to the call to increase access to justice for all. This call is underpinned globally by Sustainable Development Goal 16.3, and locally, in South Africa, through the strategic outcomes of the Department of Justice and Constitutional Development as envisioned by section 34 of the South African constitution.¹

We, firstly, explore definitions of access to justice to provide an outline of what access to justice entails. We also discuss the prevalence of justice problems in the South African context. The world continues to grapple with access to justice as the inequality gap widens and new data estimates that 5.1 billion people have unmet justice needs.² In South Africa, as in many other countries, people experience obstructions to access to justice. This is due to a number of multi-layered and complex causes ranging from systemic flaws, economic barriers and corruption to a lack of legal agency or empowerment. The problem of access to justice is, therefore, multi-dimensional and justice systems can be described as complex adaptive systems.³ This description points to the fact that justice systems operate with a congeries of

¹ Constitution of the Republic of South Africa, 1996. Section 34 states the following: ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

² World Justice Project (WJP). Rule of Law Index (RoLI) (2020), 15-17. ISBN (online version): 978-1-951330-35-4.

³ L Groff and R Shaffer, ‘Complex Adaptive Systems and Communities’ (2008) *Futures Research Quarterly*, Special Edition: Summer 5-38. A complex adaptive system is a system that is complex in that it is a dynamic network of interactions and behaviours. Justice systems are in general regarded as complex as a multitude of factors, actors, institutions, perceptions and behaviours determine and influence the functioning of the system. As such, access to justice problems aren’t easily solvable and requires the understanding of a multitude of interrelated factors that work simultaneously to impede access to justice.

actors shaping it, along with our thoughts, experiences and perceptions which reinforce social understandings about, and our behaviour toward, the justice system.⁴

Rather than trying to ‘solve’ the problem of access to justice, in this article, we explore traces and connections that might allow for a deeper understanding of justice. We suggest that by examining people’s justice stories or understandings of justice, a future of justice inclusion might emerge. In this regard, we employ aspects of a Causal Layered Analysis to investigate worldviews about and on justice.⁵ Inspired by a so-called ‘people-centred approach’ to justice, we read these worldviews through the lens of Carol Gilligan’s ‘ethic of care’ as read by Malan and Cilliers.⁶ We connect the ethic of care to the notion of ‘complexity’ in order to propose a more critical understanding of justice underpinned by humility. The article concludes by suggestion that the possibility of a future of justice inclusion lies within exploring ‘other ways of knowing’ and ‘different voices’.

⁴ J Nagtegaal, ‘The Future of Access to Justice: A Causal Layered Analysis’, (MPhil Dissertation, University of Stellenbosch 2019).

⁵ See S Inayatullah, ‘Six pillars: Futures thinking for transforming’ (2008) 10(1) Foresight 4–21. <https://doi.org/10.1108/14636680810855991>. The idea of a ‘casual layered analysis’ will be explained in more detail below. This approach can be used as a way to understand the inner world or points of view of different stakeholders regarding a specific issue or as a stand-alone methodology to help understand and gather different perspectives on a specific problem or issue.

⁶ P Cilliers and Y Malan, ‘Gilligan and Complexity: Reinterpreting the “Ethic of Care”’ (2004) *Acta Academica* 36(3) 1-20. C Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, Cambridge Massachusetts 1982).

2 Mapping Justice Journeys

2.1 Understanding the Definitions of Access to Justice

There are a number of ways in which the concept of justice can be defined. The notion contains varied meanings depending on the values and perspectives of the person interacting with or commenting on it.⁷ The meaning of justice (and, accordingly, access to justice) has for centuries been a topic of political, philosophical and policy debates.⁸ The concept of justice runs congruous with the evolution of man and by 45BC Cicero popularised a theory of justice with the Latin phrase: *Justitia suum cuique distribuit*, which roughly translates to ‘justice renders everyone their dues’.⁹

In general, justice can, therefore, be framed in its broadest sense as our right to social dues. This broader definition creates an ideal but also contains the promise that this ideal is indeed achievable.¹⁰ The broader definition also transcends the legal ecosystem.¹¹ Further, access to justice can be framed by distinguishing between *access* and *justice*. In this way, access to justice means access to the law or what Susskind terms ‘justice according to the law’.¹² The narrower definition, therefore, focusses on access to courts and concerns the economic and

⁷ *Supra* note 4, p. 8.

⁸ *ibid.*

⁹ See JD Price, ‘The Egalitarian Constitution: Modern Identity in Three Moral Values’, (DPhil, Universiteit Leiden 2018).

¹⁰ See R Sackville, ‘Some Thoughts on Access to Justice’ in Proceedings of the First Annual Conference on the Primary Functions of Government Courts (Wellington, New Zealand, 28-11-2003).

¹¹ *Supra* note 4, p. 9.

¹² R Susskind, *Online Courts and the Future of Justice* (Oxford University Press, Oxford 2019) 5.

social capacity of individuals to aid the inequality experienced in trying to assert themselves legally.¹³

In the South African context, the constitution guarantees the right to access to justice and the preamble of the Legal Practice Act acknowledges that it is not a reality for most South Africans.¹⁴ The former Minister of Justice and Constitutional Development, Jeff Radebe also acknowledged as much when he stated that ‘for access to justice to find practical meaning beyond the formalities of court litigation or equality before the law, we must create a broad social, political and economic environment for justice to prevail’.¹⁵ This, therefore, includes social justice in the definition of access to justice.¹⁶ Related to this definition, Baxi argues that access to justice can also be framed through the manner in which it is denied; the ‘spatial, temporal, linguistic, social or symbolic barriers.’¹⁷

In more concrete terms and in line with the narrower definition of access to justice, Deseau, Levai and Schmiegelow divides access to justice into four dimensions: information, social, geography and cost.¹⁸ Accordingly, a society that prioritises access to justice should

¹³ E Katsh and O Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press, Oxford 2017) 4.

¹⁴ Legal Practice Act 28 of 2014. Republic of South Africa.

¹⁵ J Radebe, ‘Challenges Facing Access to Justice in South Africa’ (2012) Politics Web, University of Cape Town, South Africa (Speech delivered on 16 October 2012).

¹⁶ See M Nyenti, ‘Access to Justice in the South African Social Security System: Towards a Conceptual Approach’ (2013) 46(6) *De Jure* 901–916, 2-3.

¹⁷ P Baxi, ‘Access to Justice and Rule-of (Good) Law: The Cunning of Judicial Reform in India’ (2008) 2(2) *Indian Journal of Human Development* 279–302, 281. <https://doi.org/10.1177/0973703020080202>

¹⁸ A Deseau, A Levai, and M Schmiegelow, ‘Access to Justice and Economic Development: Evidence from an International Panel Dataset’, (2019) No 2019009, LIDAM Discussion Papers IRES, Université catholique de Louvain, Institut de Recherches Economiques et Sociales (IRES).

ensure that the majority of its populous know their rights and how to protect them (information), have no discrimination within the judicial process (social), be enabled to reach a court (geography) and the economic barrier should not prohibit them from the process (cost).¹⁹ Further, the Open Society Foundation bases its understanding of access to justice on the ability to obtain just ‘resolution of justice problems in compliance with human rights standards’ through formal and informal tribunals that are impartial and possess appropriate legal support.²⁰ This definition extends to seven dimensions with a critical focus on the quality of the judicial process and outcomes. These dimensions are the substance of the law; the availability of legal institutions; and their quality; the availability; and quality of legal assistance; the quality of outcomes; and legal capability or empowerment.²¹ ‘Justice problems’ are defined as ‘problems raising legal issues whether or not these are recognised as such by the individuals facing them, and whether or not action taken to deal with them involves lawyering or legal process’.²² Susskind also frames the delivery of justice through seven aspects: fair decision, fair process, transparency, equitable distribution, appropriately balanced, backed by the state, and sustainability.²³

In the *Measuring Access to Justice in a Globalising World-project*, the three main dimensions of access to justice are: the costs of procedure (economical barriers); quality of process; and quality of the outcome.²⁴ The project further expands with sub-dimensions:

¹⁹ *ibid.*

²⁰ OECD/Open Society Foundations, ‘Legal Needs Surveys and Access to Justice’ (OECD Publishing, Paris 2019) <https://doi.org/10.1787/g2g9a36c-en>.

²¹ *ibid.*

²² *ibid.*

²³ Susskind, ‘The Future of Justice,’ (n 12).

²⁴ M Gramatikov, M Barendrecht, M Laxminarayan, JH Verdonschot, L Klaming, and C van Zeeland, *A Handbook for Measuring the Costs and Quality of Access to Justice* (Maklu Publishers, 2010), 35-37.

monetary costs; opportunity costs; stress and emotions; procedural justice; interpersonal justice; informational justice; distributive justice; restorative justice; functionality; and transparency.²⁵

From these dimensions, it can be concluded that the concepts of fairness, education, quality, availability, geography and empowerment lie at the root of most definitions. It is also important to mention that justice journeys lend further understanding to the concept of access to justice. Justice journeys are commonly known as pathways to justice, which moves away from the traditional idea that justice is only provided by the formal legal industry.²⁶ Pathways to justice can include the formal route – i.e. legal practitioner, court system, criminal justice system – or informal pathways such as paralegals, non-lawyer solutions,²⁷ alternative dispute resolution,²⁸ community-based mediation,²⁹ and social justice or public interest lawyering.³⁰

2.2 Measuring Access to Justice in South Africa

In South Africa, many people face the same justice problems as in the rest of the world, including the fact that the law is inaccessible, unaffordable, and often too complicated, thereby affecting people’s legal empowerment or legal agency. Many authors have called for the reimagining of law so as to rethink the traditional model that support the barriers that keep

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ See for example M Ionescu, ‘Alternative Dispute Resolution’ (2009) xxii (2) *Lex et Scientia* 89–92.

²⁸ See for example S Clarke and S Forell, ‘Pathways to Justice: The Role of Non-Legal Services’ *Justice Issues*, Paper 1, June (2007) 1–12.

²⁹ See for example B Billingsley and M Ahmed, ‘Evolution, Revolution and Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada’ (2016) 45(2-3) *Common Law World Review* 186–213. <https://doi.org/10.1177/1473779516657745>.

³⁰ *Supra* note 4, p. 26.

the law inaccessible.³¹ The first global study on the justice experience was conducted in 2019 by the World Justice Project, which included South Africa on its list of 101 countries.³² The study measured justice experiences across continents and jurisdictions and from the 1014 surveyed, 50% indicated that they needed some form of legal intervention for issues they regard as justice problems. South Africa seems to show a prevalence for justice problems, and it ranked 47th on the Rule of Law Index of 123 countries. The World Justice Project also reported that only 65% of South Africans know where to get legal help.³³ The ability to get legal help indicates some agency in the legal system and it postulates some form of personal empowerment to assert oneself in society.

Judge density is also often used for measuring access to justice. The more judges *per capita* a country or region has, the better the quality of justice for its citizens. Deseau et al. indicate that for the period 2008-2018, South Africa falls in the lower regions and trails far below European averages as far as judge density is concerned.³⁴

In a justice survey that surveyed 1184 random South Africans in all eleven official languages of which 1011 completed the survey, 51% indicated that they had a justice problem,

³¹ See HW Arthurs, 'The Future of Law School: Three Visions and a Prediction' (2014) 51(4) *Alberta Law Review* 705-716; Susskind *supra* note 12; J Susskind, *Future Politics: Living Together in a World Transformed by Tech.* (Oxford, Oxford University Press 2018); R Susskind, *The End of Lawyers?* Oxford, Oxford University Press 2010); Hague Institute of Innovating Justice, *Law Scenarios to 2030* (2012); Hague Institute of Innovating Justice, *Charging for Justice: Trend Report* (2020).

³² *Supra* note 2, p. 7.

³³ *ibid.*

³⁴ *Supra* note 18, p. 136.

while 7% were unsure if they had experienced a justice problem (Nagtegaal, 2020).³⁵ The respondents were also asked how their justice problems influenced them. According to their response, 51% indicated that they suffered stress-related illnesses, relationship breakdown, loss of employment or income, or alcohol and drug-related issues.³⁶ The results of the survey further indicated the following: 55% of South Africans know where to get legal help, only 45% feel like they can enforce their legal rights, 86% of South Africans experienced a stress related illness when dealing with a legal problem, less than half of South Africans feel their justice problems have a fair outcome, and only half of all legal solutions are implemented.³⁷

It is important to note that justice journeys rely on self-reporting, understanding legal problems, and personal assessments of personal problems against an array of different rights and different recourses in various legal economies.³⁸ Therefore, no significant inferences can be made on how the prevalence of justice problems could be an indicator of access to justice, it merely indicates that justice problems are prevalent and are experienced, on average, by half of all people.³⁹ Further, if access to justice is based on aspects of fairness, quality, education,

³⁵ This survey was conducted as part of a research project for the fulfilment of an MPhil in Future Studies at the University of Stellenbosch. The dissertation used primary and secondary research methodologies within the four layers of the Causal Layered Analysis. An online survey tested justice journeys of South Africans which were then compared to similar local and international studies. A STEEP analysis of Social, Technological, Economic, Environmental and Political factors provided an overview of the legal eco system to frame the context within which access to justice operates. The Department of Ethics Screening Committee of the University of Stellenbosch approved the application for ethical clearance for the survey tool. See J Nagtegaal, 'The Future of Access to Justice' (n 4).

³⁶ *Supra* note 4, p. 37-38.

³⁷ *Supra* note 4, p. 43.

³⁸ *Supra* note 4, p. 48.

³⁹ *Supra* note 4, p. 51.

availability and agency to act, the justice journeys that were surveyed merely demonstrate that there are a number of obstructions.⁴⁰ In this regard, the survey remains relatively static in a very complex system, giving glimpses that something is broken, but not illuminating any deeper understanding of why.

As such, in the next section, we examine a people-centred approach as well as employing some of the insights of what is referred to as a ‘casual layered analysis’.⁴¹ Put differently, we take as our inspiration a people-centred approach as well as approaches that aim for a more comprehensive understanding of access to justice. As Farrow argues, definitions of access to justice are based on an academic understanding of the issues at hand and have therefore neglected the public voice in interpreting access to justice.⁴² The approaches we explore can hopefully assist in providing a deeper understanding of access to justice and justice problems.

3 A People-Centred Approach

As alluded to above, access to justice has evolved from a linear and academic understanding to a broader concept that includes human perception, quality, and more profound social qualms that contribute to the experience of social justice. The future of access to justice will move beyond traditional legal pathways, in collaboration between governments and communities, to offer more holistic solutions.⁴³ This indicates a shift from an institutional perspective to human experience.⁴⁴

⁴⁰ *Supra* note 4, p. 51-52.

⁴¹ *Supra* note 5.

⁴² TCW Farrow, ‘What is Access to Justice?’ (2014) 51(3) *Osgoode Hall Law Journal* 957–988.

⁴³ *Supra* note 4, p. 27.

⁴⁴ *ibid.*

Organisations such as the Taskforce for Justice champion what may be described as a people-centred approach, focussing on understanding the justice needs of people from around the globe.⁴⁵ The Taskforce's approach seeks to gauge human justice needs and propose solutions through an array of paths. This type of approach is also followed by the Hague Institute for Innovation of Law (HiiL) and the World Justice Project, which adopts a comprehensive view of justice from the standpoint of individuals rather than institutions.⁴⁶

A more comprehensive understanding of access to justice corresponds with the 'causal layered analysis', a so-called foresight tool designed by Sohail Inayatullah to deepen the insight into a particular problem.⁴⁷ We employ this type of analysis as it allows for the 'articulation of constitutive discourses' through various levels of inquiry.⁴⁸ This approach seeks to go beyond the conventional framing of issues by unpacking ideologies.⁴⁹ It offers a way in which to deconstruct complex social problems,⁵⁰ is inspired by 'poststructuralism, macrohistory, and postcolonial multicultural theory',⁵¹ and presents a pragmatic map to reach deep worldview

⁴⁵ Task Force on Justice, Justice for All, 'The report of the Task Force on Justice: Conference version' Overview Booklet (New York: Center on International Cooperation, 2019).

⁴⁶ *Supra* note 2 and note 31.

⁴⁷ S Inayatullah, 'Methods and Epistemologies in Futures Studies' in RA Slaughter (ed) *The Knowledge Base of Futures Studies* (Foresight International, 2005)

⁴⁸ *ibid.*

⁴⁹ S Inayatullah, *Questioning the Future: Methods and Tools for Organisational and Societal Transformation* (Tamsui, Tamkang University Press, 2005/7) 3.

⁵⁰ BJ Bishop and PL Dzidic, 'Dealing with Wicked Problems: Conducting a Causal Layered Analysis of Complex Social Psychological Issues' (2014) 53(1-2) *American Journal of Community Psychology* 13–22, 15. <https://doi.org/10.1007/s10464-013-9611-5>.

⁵¹ S Inayatullah, 'Prospective and Strategic Foresight Toolbox Causal Layered Analysis' (2017) April, *Futuribles International* 5.

commitments beyond surface phenomena.⁵² Further, causal layer analysis aims to be a non-linear, dynamic approach operating at a number of levels simultaneously.⁵³

The analysis consists of four layers: the first layer, the *litany layer*, highlights noticeable aspects within the specific domain of research. It takes the surface phenomena at face value and doesn't present any solutions for change. The second layer, the *systemic layer*, is concerned with interpreting quantitative data and seeks to find technical and structural explanations.⁵⁴ The third- and fourth layers deal with *worldviews* and *archetypes* respectively. In the third layer, cultural perspectives are examined, and the fourth layer is a space of metaphors that examine collective archetypes and the unconscious.⁵⁵

As the problem of access to justice presents itself as a complex problem, an approach is needed that focusses on many spheres of the system of justice. However, for the purposes of our research here, we focus on the interior worlds of justice users. A focus on the worldviews and perceptions of the experience of justice is not only in line with a people-centred approach, but it also seeks to illuminate, in more detail, the often-neglected public voice in issues of access to justice. As such, it concerns the third layer of Inayatullah's causal analysis, namely, *worldviews*.⁵⁶ As mentioned above, this article does not seek to 'solve' the problem of access to justice, but to trace outlines, make connections and present an opportunity for a deeper understanding of justice problems in South Africa. Understanding how our justice journeys

⁵² RA Slaughter, 'Integral Futures – A New Model for Futures Enquiry and Practice' in RA Slaughter (ed) *The Knowledge Base of Futures Studies: Professional Edition* (Foresight International, 2005).

⁵³ A Fricker, 'Changing the Terms of the Debate: Causal Layered Analysis and Genetic Engineering in New Zealand Agriculture' in RA Slaughter (ed) *The Knowledge Base of Futures Studies: Professional Edition* (Foresight International, 2005).

⁵⁴ *Supra* note 4, p. 32-33.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

and the concept of justice is shaped through current narratives holds critical insights when looking to transform access to justice. As such, it discloses a possible future of justice inclusion.

The worldviews are explored through submissions of South African writers and poets who shared their perspective on justice and its future within South Africa through an Art for Justice initiative by Law For All.⁵⁷ These poems and short stories represent what Inayatullah terms ‘other ways of knowing’ and also represents the notion of a ‘different voice’⁵⁸ as put forth by Carol Gilligan in her formulation of an ‘ethic of care’.⁵⁹ Before we turn to the submissions of writers and poets in order to explore the role of worldviews in access to justice, we explain Yvonne Malan and Paul Cilliers’ reading of the ‘ethic of care’ tied to the notion of ‘complexity’.⁶⁰ The ‘ethic of care’ and Gilligan’s conception of a ‘different voice’ provides a framework through which to consider justice worldviews, stories and poems.

⁵⁷ *Supra* note 4, p. 35-37. This involved submissions by South African writers and poets, who shared their perspective on justice and its future within South Africa, for an Art for Justice initiative by LAW FOR ALL, a South African Legal Expense Insurance Provider. The research also formed part of an Mphil in Future Studies. See J Nagtegaal, ‘The Future of Access to Justice: A Causal Layered Analysis’, (MPhil Dissertation, University of Stellenbosch 2019).

⁵⁸ *Supra* note 49, p. 3-4.

⁵⁹ C Gilligan, *In a different voice: psychological theory and women’s development* (Harvard, Massachusetts, Harvard University Press 1982)

⁶⁰ P Cilliers and Y Malan, ‘Gilligan and complexity: Reinterpreting the “ethic of care”’ (2004) 36(3) *Acta Academica* 1-20. It is important to note that the notion of the ethic of care has been widely engaged with in feminist theory (see Benhabib S, ‘The generalized and the concrete other: The Kohlberg-Gilligan controversy and feminist theory’ in S Benhabib and DL Cornell (eds) *Feminism as Critique* (Polity Press, Cambridge 1987)). In the South African context and in what can be termed ‘post-apartheid jurisprudence’, scholars such as Van Marle (K Van Marle, ‘Towards an Ethical Interpretation of Equality’, LLD Thesis (University of South Africa, 1999); K van Marle ‘Laughter, Refusal, Friendship: Thoughts on a “jurisprudence of Generosity”’ (2007) 18 *Stellenbosch Law Review* 198-206; K van Marle, ‘Refusal, Risk and Liminality’ in K van Marle (ed) *Refusal, Transition and*

Post-apartheid Law (SunMedia, Stellenbosch 2009)) has regarded the distinction between the ethic of care and the ethic of justice as significant to the South African post-apartheid Constitutional order insofar as it emphasises the concrete needs and contexts of individuals, specifically those historically marginalised by apartheid and, more pertinently, women affected by gender violence and the feminisation of poverty. In her initial engagements, Van Marle highlighted the South African Truth and Reconciliation Commission as a site where individuals were treated equally while taking into account their specific circumstances, concrete contexts and differences (K Van Marle, 'Towards an Ethical Interpretation of Equality', Doctor of Laws Thesis (University of South Africa 1999). In later contributions, Van Marle engaged the ethic of care alongside Drucilla Cornell's formulation of 'ethical feminism' as a project that seeks to refuse essentialist accounts of women and emphasise the differences between women as well as exposing the limits of the law and other institutionalised attempts in ensuring women's equality. As with the ethic of care, ethical feminism is concerned with the everyday lives of individuals, the marginalised or 'the other', and with concrete contexts of exploitation. (see D Cornell, 'The doubly-prized world: Myth, allegory and the feminine' (1990) 75 *Cornell law Review* 644- 699; *Beyond accommodation* (Routledge, New York 1991); *The philosophy of the limit* (Routledge, New York 1993)). See also Modiri in his discussion of women's lived realities and contexts as experienced under the law and popular culture (J Modiri 'Popular Culture, Law and our "sexed and gendered lives": Feminist reflections on "refusal" and "sisterhood" (2012) 1 *Stellenbosch Law Review* 118-136). Modiri invokes Van Marle's ethics of refusal, undergirded by ethical feminism, to problematise, deconstruct and re-interpret the images, representations, and harmful stereotypes of women as well as to point to the phallogocentric nature of law and the fact that the law is imbued with gendered power. Post-apartheid jurisprudence in general has been described as a critical project that seeks to rethink prevalent ideas on transformation and as an attempt to raise concern for the marginalised in South Africa, everydayness, and contexts of oppression. For post-apartheid thought in general see K van Marle (ed) *Refusal, Transition and Post-apartheid Law* (SunMedia, Stellenbosch 2009); W le Roux, *Post-apartheid Fragments, Law Politics and Critique* (University of South Africa Press, Pretoria 2007). The engagements described above and general tenets in post-apartheid jurisprudence connects with some of our arguments described here, specifically an approach to justice that is concerned with different voices, lived reality, and the contextual embeddedness of individuals. To be clear, although we could have focussed on several different engagements with the ethic of care, we focus on Malan and Cilliers' discussion as they explicitly connect the notion of complexity with the ethic of care (P Cilliers and Y Malan, 'Gilligan and complexity: Reinterpreting the "ethic of care"' (2004) 36(3) *Acta Academica* 1-20). As such,

4 A ‘Different Voice’

4.1 *The Ethic of Care*

Malan and Cilliers explain that Carol Gilligan’s controversial *In a different voice: Psychological theory and women’s development* was written, to a large extent, to challenge Lawrence Kohlberg’s *The philosophy of moral development* in which he argued that there are six stages of moral development and that women do not ‘fully develop’ to the sixth stage.⁶¹ The crux of Gilligan’s argument against Kohlberg’s assertions is that there is more than one ‘moral voice’: ‘there is also an “ethic of care” that can be contrasted with the “logic of justice,” which Kohlberg views as the highest level of moral development’.⁶²

Malan and Cilliers also note that Gilligan’s ‘ethic of care’ has been criticised for being essentialist as it reproduces gender stereotypes based on the idea that women are essentially caring.⁶³ The authors, however, reinterpret Gilligan’s ethic of care as a way of viewing ethics in society within a complex system and they argue (as Gilligan herself has) that the ‘ethic of care’ and the ‘logic of justice’ should be read as having a ‘dynamic interaction’ – ‘together they may force a continual redescription of what justice and law entail’.⁶⁴ Below, we discuss their rereading of Gilligan’s ‘different voice’ constituting an ‘ethic of care’.

their discussion aligns with our general call to regard the legal system as a complex system and access to justice as a complex problem. We, therefore, acknowledge the wide-ranging re-imaginings of the ethic of care, but subjectively choose to focus on Malan and Cilliers’ rethinking to consider access to justice in light of complexity theory (See P Cilliers, *Complexity and Postmodernism: Understanding Complex Systems* (New York: Routledge 1998).

⁶¹ L Kohlberg, *The philosophy of moral development* (San Francisco, Harper & Row 1981).

⁶² *Supra* note 60, p. 2.

⁶³ *ibid.*

⁶⁴ *Supra* note 60, p. 7.

Gilligan's criticism of Kohlberg's contention that women's moral development is insufficient consists of the following: Kohlberg identifies six phases of moral development that starts with an egocentric understanding of ethics 'where principles used to make moral judgments are universal and abstract in nature'.⁶⁵ For Kohlberg, the highest level of moral development is achieved once ethical decision-making is freed from historical and psychological constraints or freed from what Malan and Cilliers call 'concreteness and particularity'.⁶⁶ Gilligan terms this understanding of ethics as 'the logic of justice' and she argues that there is also an 'ethic of care'. As Malan and Cilliers explains:

Whereas the logic of justice emphasises the application of abstract rules and principles (by the autonomous individual), the focus of the ethic of care is on relationships and the interdependence between human beings in specific contexts.⁶⁷

Malan and Cilliers further explain that Gilligan illustrates the idea of a 'different voice' through her famous 'Heinz example' also used by Kohlberg - A story is told to two eleven-year-olds named Jake and Amy: A man called Heinz has a wife that has a life-threatening illness. He cannot afford the medicine to save her life and is confronted with the choice of whether or not to steal the drug from the pharmacist.⁶⁸

For Jake, a human life is worth more than the financial loss that the pharmacist would suffer. The pharmacist can always make more money, but Heinz's wife will die unless she gets the medicine. Therefore, Jake argues that Heinz's wife can never be replaced, and Heinz would

⁶⁵ *Supra* note 60, p. 3.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *Supra* note 60, p. 4; *Supra* note 59, p. 25-26.

be justified in stealing the drug.⁶⁹ The solution is obvious to Jake: 'It involves a calculation of competing rights and placing these rights in a particular hierarchy. He reduces the problem to terms of rights and property. He then ranks the values at stake (the right to life versus the right to property) and selects the ranking value.'⁷⁰

For Amy, on the other hand, there is no easy solution to the problem.⁷¹ She argues that stealing is wrong, even in the context of Heinz's circumstances. She is concerned with the pharmacist's failure to respond to the problem, and she argues that 'if [they] talked long enough, they could reach something besides stealing'.⁷² Thus, Amy focusses not on competing rights but on the 'concrete situation of the dilemma and the relationships between people described in it'.⁷³ For Amy, the pharmacist is a party to the relationship between Heinz and his wife and the transaction and the right to property is, therefore, less important. Amy is also concerned with the possible consequences of stealing the life-saving drug. If Heinz gets arrested and goes to jail, who will take care of his wife?⁷⁴ As Malan and Cilliers argue: 'In other words, Amy sees the world composed of relationships between people rather than a system of rules, competing rights and hierarchical values'.⁷⁵

For Gilligan, Jake sees the dilemma as a 'math problem with humans in it' whilst Amy sees the world as 'comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through a system of rules'.⁷⁶

⁶⁹ *Supra* note 59, p. 26.

⁷⁰ *Supra* note 60, p. 4.

⁷¹ *Supra* note 59, p. 27-29.

⁷² *Supra* note 59, p. 29.

⁷³ *Supra* note 60, p. 4.

⁷⁴ *Supra* note 59, p. 28.

⁷⁵ *Supra* note 60, p. 5.

⁷⁶ *Supra* note 59, p. 28-29.

Gilligan argues that there is more than one 'voice' when it comes to moral problems and that which Kohlberg discards as 'under-development', is in fact a 'different voice'.⁷⁷ The 'different voice' is the 'ethic of care' that stands in contrast to the logic of justice; 'it moves the emphasis from the abstract values of universality, logic and detachment, to an emphasis on relationships, care and responsibility'.⁷⁸

In response to criticisms of essentialism and the contention that the argument does not hold for the black community in the USA, Gilligan explains that the ethic of care is not intended as an ethic for women only and should precisely, in a number of different contexts, undermine the ethic of dominance.⁷⁹ Malan and Cilliers also assert that the ethic of care should be understood within a framework of justice as something that tempers justice and emphasises respect for people on their own terms.⁸⁰ As Gilligan stated in an earlier work:

[T]rough the tension between the universality of rights and particularity of responsibility, between the abstract concept of justice as fairness and the more contextual understanding of care in relationships, these ethics keep one another alive and inform each other on critical points [...] In this sense, the concept of morality sustains a dialectical tension between justice and care, aspiring always toward the ideal of a world more caring and more just.⁸¹

⁷⁷ *Supra* note 60, p. 5.

⁷⁸ *ibid.*

⁷⁹ *Supra* note 60, p. 8.

⁸⁰ *ibid.*

⁸¹ C Gilligan, 'Do the social sciences have an adequate theory of moral development?' in Haan et al (eds) *Social Science as Moral Inquiry* (New York, Columbia University Press 1983) 33-51, 47

Therefore, the ethic of care and the logic of justice can inform each other in a powerful way. For Malan and Cilliers, it is the realisation that matters of justice are not ‘merely calculations in a sphere of competing demands and rights’ but rather involve ‘concrete individuals and singular situations.’⁸² Or as Walker asserts, the ethic of care ‘allows for fine-grained judgments and discretionary responses to particular persons in actual situations with distinctive histories.’⁸³

4.2 Complexity

Malan and Cilliers (2004) regard the notion of ‘complexity’ and specifically the idea that society can be viewed as a complex system as playing an important role in understanding the ethic of care. They argue that to underestimate or disregard complexity is not simply a technical error, but an ethical mistake.⁸⁴ The authors subscribe to a definition of ethics as proposed by Drucilla Cornell as a non-violative relationship with the Other;⁸⁵ justice is concerned with continually redrawing the boundaries of a system and the ethic of care emphasises that society consists of complex relationships between individuals, and is therefore too complex to be thought of solely in terms of rights and procedures.⁸⁶ Therefore, social systems are complex

⁸² *Supra* note 60, p. 8.

⁸³ MU Walker, ‘Picking up the Pieces: Lives, Stories, and Integrity in Meyers (ed) *Moral Understandings: A Feminist Study in Ethics* (New York: Oxford University Press 1997) 56-72, 64.

⁸⁴ *Supra* note 60, p. 3.

⁸⁵ D Cornell, *The philosophy of the limit* (New York: Routledge 1992) 13.

⁸⁶ *Supra* note 60, p. 13.

and embody the characteristics of complex systems in general.⁸⁷ In complex systems, an enormous number of individuals interact constantly in a rich and dynamic way:

The importance of seeing society as a complex system – instead of as a chaos that needs to be ordered – is that it recognises and gives importance to the multitude of contingent relationships that exist in society and to the dynamic interaction between these relationships. Thus there is a move away from an overemphasis on universal issues to an “appreciation” of the singular.⁸⁸

This line of thinking describes systems thinking in general. As Sterman explains:

[Systems thinking] requires respect and empathy for others and other viewpoints. Most important, and most difficult to learn, systems thinking requires understanding that all models are wrong and *humility* about the limitations of our knowledge. Such humility is essential in creating an environment in which we can learn about the complex systems within which we are embedded and work effectively to create the world [and the future] we truly desire [own emphasis].⁸⁹

⁸⁷ P Cilliers, ‘Postmodern knowledge and complexity (or why anything does not go)’ 1995 14(3) South African Journal of Philosophy 124-32; P Cilliers, *Complexity and Postmodernism: Understanding Complex Systems* (New York: Routledge 1998).

⁸⁸ *Supra* note 60, p. 3.

⁸⁹ JD Sterman, ‘All Models are Wrong: Reflections on Becoming a Systems Scientist’ (2002) 18(4) System Dynamics Review 501–531, 502.

5 Justice Stories: Toward a Future of Justice Inclusion

As mentioned above, in this section, we explore worldviews, which we argue can provide a deeper understanding of how justice journeys and the concept of justice is shaped through narratives of our time. Read through the lens of the ethic of care and complexity and underpinned by the need for a people-centred approach to access to justice, these ‘different voices’ and ‘other ways of knowing’ can legitimise the dilemma of access to justice.⁹⁰ According to Inayatullah, ‘stories do not describe reality; they create reality. Stories create us. They matter’.⁹¹

In the study, a total of 114 submissions were analysed.⁹² Each written contribution was coded with specific themes that emerged from their reading. In total, 31 themes emerged from the submissions. These themes indicate far greater justice challenges than mere legal process; as these are the stories we tell ourselves and others. These are the narratives we pass down that shape an intergenerational interaction with the law and the ideas that influence how, why and when we interact with the law and justice.⁹³

The colour of the skies don't look the same no more

The chirping of the birds doesn't sound the same

The soil beneath the earth does not feel the same

The grass is not greener on either sides

We are scarred before birth

(Submission Excerpt: Are Our Bodies the Sin, Khanyi Mathayi)

⁹⁰ S Inayatullah, ‘Six Pillars: Futures Thinking for Transforming’ (2008) 10(1) Foresight 4–21.

⁹¹ S Inayatullah, ‘The Story Creates the Futures’ (2019) 29 Critical Muslim 55–69, 56.

⁹² *Supra* note 4, p.62.

⁹³ *ibid.*

The following themes prominently emerged from the submissions: poverty, racism, same dream, sexism, social justice, unity, family structure, apartheid, the legacy of apartheid and colonialism, corruption, crime, education, equality, failed dream, gender-based violence, hope, and personal despair.

When looking at the interconnections of these themes, the complexity of the dynamic nature of justice and access to it becomes clear.⁹⁴ Therefore, the demarcation of the definition of access to justice, as two separate constructs, becomes blurred. In this way, justice cannot be sanitised or contained to formal process; the themes speak to a number of societal aspects and lived experiences, from absent fathers, to lack of proper education, the remnants of apartheid and colonialism and the plague of corruption and crime.⁹⁵

Back in 2012 I began a second chapter of my life

But my freedom was violated like it was not protected

Felt in one's bones like in 1994, although it was before my time.

Law through legislation and constitution has always been a root to govern

But we are a generation that believes laws are meant to be broken

If we are to continue with them, our future will seize to exist.

(Submission Excerpt: Enactment, Sigcine Sqangwa)

At the heart of many of the narratives is the yearning for equality in South Africa. The stories speak to inequality in accessing law, inequality in education and housing, inadequate legal recourse and protection from crime. And a number of narratives speak to the injustice of the

⁹⁴ *Supra* note 4, p.63.

⁹⁵ *ibid.*

past and the remaining spatial, temporal, linguistic, social or symbolic barriers to access to justice.⁹⁶

You will see school buildings with broken windows, vandalized walls.

The street separations go

from tar to foot made road passing's and sandy pave ways.

All a constant reminder of Aluta continua, not yet uhuru.

(Submission Excerpt: A future for South Africa where the law belongs to all, P. Thulani)

A people constantly subjected to divisions,

Precipitated from a subtracted past.

Granted a freedom

Now said to be ours,

As if permission to such a right

We first needed to seek.

Sold a dream

At the cost of a decent quality of life,

As poverty mixes with the air

Feeding our lungs;

While our breaths reek

Of the despairing standards set to define us

And minds like rental property

To a decaying hope

⁹⁶ *Supra* note 17, p. 281.

(Submission Excerpt: Tomorrow reimagined, Katleho Khaolo)

Mandela gave birth to freedom and riches,

Today this world is full of witches,

Waiting for an opportunity to lead the youth astray,

As a result black inferiority is reborn.

(Submissions Excerpt: Everybody has a dream and I have plenty, S. Yenge)

A world that is okay with protecting the upper elite while the lower majority struggle to breathe.

(Submission Excerpt: Gone are the days, Noma Bota)

These other ways of knowing can assist in understanding worldviews and myths of South Africans, which influence the way in which we interact with the justice system. Importantly, many of the narratives also contained aspirations of hope, of a future of access to justice that we should strive for.

But let us redirect these flames to a future that is just,

let our hopes for this future be contagious and create trust.

(Submission Excerpt: Hope is contagious, Li-Fen Chien)

Our seeds have found a home,

Indeed tomorrow's sun is ploughing hope.

(Submission Excerpt: A dream of the southern shores, Andile Nayika)

So, I am choosing to stay in this life.

To live here.

To die here.

Here, freely.

Home.

(Submission Excerpt: A Metaphor for Africa, Zizipho Bam)

An African dream of love

Is spread singing songs of a nation

With just one mouth and ear.

(Submission Excerpt: A dream of the southern shores, Andile Nayika)

When Gogo used to dream about the future, no one thought about whose dreams she was talking. No one thought then, about who was dreaming her dreams instead. But it was in fact those dreamers, too, who helped to bring us full circle, quietly remembering the ones who came before, weaving the past into some new future.

(Submission Excerpt: Circles, Andrea Teagle)

As mentioned, these poems, stories and worldviews represent ‘other ways of knowing’ and a ‘different voice’. In different voice(s) they indicate the importance of a holistic understanding of justice. The worldviews speak to particularity, context, concreteness, relationships, and location, ‘we are scarred before birth’, ‘as poverty mixes with the air’, ‘you’ll see school buildings with broken windows and vandalised walls’. They do not indicate individuals that are defined as atomistic and separate, but rather points to people ‘delineated through

connection'.⁹⁷ The justice that many of these stories seek relate to a number of aspects rooted not solely in the logic of justice but an ethic of care that speaks to relationships, interconnectedness and interdependence between humans, 'let *us* redirect', 'let *us* hope', '*together we* can achieve justice', 'quietly remembering *the ones who came before*'. These stories also speak to an apartheid past, and the remaining lack of social justice, 'a people subjected to divisions', 'as a result black inferiority is reborn' as well as emphasising the importance of hope for a future justice 'weaving the past into some new future'.

These worldviews also speak to complexity, undermining the idea that justice can be divorced from context and achieved only through the application of abstract rules and principles. In these stories, there are no easy solutions, but rather a deeper sense of knowing that injustice persists, 'a world that is okay with protecting the upper elite while the lower majority struggle to breathe'. The worldviews bleed into all aspects of life and connects to Gilligan's view that:

The blind willingness to sacrifice people to truth [...] has always been the danger of ethics abstracted from life.⁹⁸

6 Conclusion

An ethics abstracted from life signifies a logic of justice divorced from the ethic of care, formal legal process divorced from social justice, and viewing justice problems as solvable without taking into account complexity and humility that accepts the limitations of knowledge. As Cilliers explains:

⁹⁷ *Supra* note 59, p. 32-33.

⁹⁸ C Gilligan, In a different voice: conceptions of self and morality (1977) 47 Harvard Educational Review 481-517, 483.

The nature of a complex system is determined by a large number of elements that interact in a dynamic and non-linear fashion [...] Furthermore, complex systems are open, operating under conditions far from equilibrium. They interact with their environments, and it is therefore difficult to determine their boundaries. The identity and actions of a system are constituted through patterns of interaction, not by fixed or a priori components. Because of its nonlinearity, an accurate description of such a system would entail a detailed description of every single interaction, an impossible task for finite beings to perform. Although one can discover general patterns, the whole system cannot be described without running into difficulties. A complex system cannot be replaced with an equivalent system that is simpler — complexity is incompressible.⁹⁹

In sketching justice problems in South Africa, it becomes clear that a number of factors continue to reduce access to justice to a mere promise or ideal. There are massive economic, geographical as well as symbolic and social barriers that obstruct the majority of citizens from realising their constitutional right to access to justice. These have been well-documented. Although a large number of systemic obstructions can be addressed through policy initiatives, our suggestion here is that a more holistic and people-centred understanding of justice can aid in transforming access to justice. In exploring different voices and other ways of knowing through the lens of the ethic of care as tied to the notion of complexity, we call for approaches to access to justice that take into account the concrete contexts, lived realities and particularities of the ‘users’ of justice; different ways of knowing and different voices allow for a deeper understanding of the role of justice in society.

⁹⁹ *Supra* note 87, p. 9-10.

Further, the notion of complexity allows for an understanding of justice as a process whereby the boundaries of the justice system is critically and continually redescribed.¹⁰⁰ Addressing the future of access to justice is a complex and immense task. However, from the worldviews explored above, a narrative of justice exclusion and a hope for a future of justice inclusion emerge. The distance or the disconnect between the ‘users’ of justice and the forces that shape our laws also becomes clear. This disconnect leads to justice continuously breaking down, signifying a ‘decaying hope’. A possible future of justice inclusion depends on our ability to allow for other ways of knowing in all its particularity, concreteness, incompressibility and hopeful complexity.

¹⁰⁰ *Supra* note 60, p. 12.