THINKING THE BOUNDARIES OF CUSTOMARY LAW IN SOUTH AFRICA

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ABSTRACT

This article begins by taking up the theoretical proximity between scholar and attorney Wilmien Wicomb’s conception, drawn from a hybrid of Derridean thought and cybernetic theory, of customary law within South Africa as a ‘complex system’, and the complexity theory of founding neoliberal legal thinker Friedrich Hayek, for whom cybernetic complexity theory was a substantial intellectual influence. Wicomb’s theoretical frame raises the question of the role the market plays and ought to play in the creation and maintenance of spaces within which customary law can function as an independent, constitutionally recognised source of law within South Africa. This question is of pressing importance at a moment when neoliberalism, understood as a mode of governance, is an active and harmful paradigm in the lives of members of customary communities, as well as in the legal culture more broadly, in South Africa, as an analysis of the legal norms present in South Africa’s ‘vision for 2030’, the National Development Plan, will demonstrate. Wicomb’s work, it is argued, offers an occasion for a critical rethinking of the status of customary law, its boundaries, and the kinds of legal institutions capable of responding to it at the contemporary legal moment in South Africa.

Key words: access to justice, community rights, courts, customary law

I  INTRODUCTION

In a 2013 paper, Wilmien Wicomb, attorney at the Legal Resources Centre (LRC) and scholar of customary law, explains that in South Africa it ‘remains something of an open question as to where our Courts understand customary law to fit into the state law structure’.1 While the Constitution of the Republic of South Africa, 1996 recognises customary law as an autonomous source of law relative to statutory law, the problem of its status relative to the complicated South African common law tradition combined with the difficulty customary communities face in gaining recognition and access to judicial remedy has stunted the realisation of rights for communities nationwide, contributing to high levels of poverty, sustained lack of tenure security on their own land, and numerous related struggles.2 The Constitutional Court broke new ground in Alexkor Ltd v Richtersveld Community when they argued:

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While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution ... the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system ... In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.\footnote{Alexkor Ltd v Richtersveld Community (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) para 51.}

Despite this advance in understanding at the highest level of South African law, the situation of many customary communities remains insecure. This article takes up Wicomb’s scholarly contribution to the ongoing debate over how customary law ought to be theorised in the legal community. Her theoretical orientation, complexity theory, is, as we will see, driven by the way in which statutory law has long been levied against customary communities resulting in a denial of the aspects of customary law that remain unintelligible within a legal context dominated by historically European norms.

This article, while insisting on the importance of Wicomb’s project, will draw out homologies between her iteration of ‘complexity theory’ and the work of Austrian neoliberal legal theorist Friedrich Hayek, himself a thinker of early cybernetic complexity. Understood as a legal theory, I argue, complexity theory shares an ancestry and conceptual structure with neoliberal legal theory. I will go on to develop the claim that certain troubling developments within South African customary policy can be illuminated and critiqued with reference to this theoretical proximity. My argument will not be that neoliberalism as a body of legal thought renders Wicomb’s work incorrect or that it proves her to be a neoliberal thinker, or (most importantly) that it reduces the urgency of her theoretical interventions, but will rather be that neoliberalism operates as an \textit{unthought} within her work that \textit{our present moment now obliges us to think.}\footnote{This paper functions as a preliminary case study in the homologies between, on the one hand, ostensibly radical, often ‘leftist’ discourses that rely on paradigms of complexity and neoliberal legal theory on the other, a full exploration of which is beyond the scope of this particular inquiry. For more on this question, see for example, W Connolly \textit{The Fragility of Things: Self-organizing Processes, Neoliberal Fantasies, and Democratic Activism} (2013).}

We will draw the grounds for the urgency of that obligation from an analysis of the neoliberal elements of the 2011 National Development Plan (NDP), and related legislation.

Of pressing importance, given the concern the two schools of thought share about the intrusion of administrative law, is the ability of customary communities and their advocates to respond to the question of why the market is not better suited than the government to the creation of the kind of legal space seemingly desired by complexity theorists of customary law. The article will end, therefore, by arguing that Wicomb’s work not despite but because of its proximity to Hayekian thought, ought to be the occasion for a more careful consideration of the role played by neoliberal norms – privatisation, corporatisation, and the reduction of rights to ‘living standards’ among others – in the development and ongoing failure of customary policy in South Africa.
II THE QUESTION OF THE CUSTOMARY

According to Wicomb, ‘customary law has an impact on the lives of an estimated 21 million people’, almost half of the population of South Africa.\(^5\) Land tenure based on customary rights is a vital component of any attempt to deal with the vast inequality in distribution of land following the end of apartheid. Customary law is recognised in s 211(3) of the Constitution. The legal status of customary law is constantly evolving. A common claim is that customary law is no longer ‘customary’, that such damage was done to so-called ‘traditional’ social and economic structures during the colonial and apartheid periods that, in fact, no one actually lives any longer under a customary system of law. As Wicomb points out, to those who believe that customary claims to rights must be made on the basis of long-standing practice, this historical reality spells out the death of customary law such that either (a) only the courts can dictate what it should mean in the contemporary legal moment; or (b) the task of thinkers of customary law is to go back and recapture some pure and ‘uncontaminated understanding of customary law from the pre-colonial period’.

In fact, we may even argue that the very concept of custom is less a description of pre-colonial communities of a certain type than, rather, a classification that entered legal discourse with the writings of legal thinker JS Mill. Mill’s critique of custom as a threat to liberal societies was undergirded by a teleology wherein societies develop towards maturity and away from a reliance on custom. He writes, in the introduction to *On Liberty* (1959):

> It is, perhaps, hardly necessary to say that this doctrine [of liberty] is meant to apply only to human beings in the maturity of their faculties ... Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. The early difficulties in the way of spontaneous progress are so great, that there is seldom any choice of means for overcoming them; and a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an end, perhaps otherwise unattainable. Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.

That he considered colonised, custom-reliant populations not yet fully mature was, then, a significant justification of paternalism and exploitation during the spread of British colonialism. Far from being an uncontaminated precursor to colonial reification, the word ‘customary’ has in a sense always already described colonial domination.

In any case, this impasse – customary law, however we understand it, is absent from the present – leads scholar Martin Chanock to counter that:

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5 Wicomb (note 1 above) 1.
6 Ibid 4.
new assertions of custom are continuously made ... There have been important changes in
the discursive strategies of custom since colonial period. Custom now represents not only a
claim about practices, but statements about identity, autonomy and self-determination made
by small and beleaguered groups subsumed within larger polities.8

More will be said later in this article about the challenges of theorising
customary, ‘living law’. What is important at the moment is to recognise that
it is by no means certain what we mean when we say ‘customary law’, as
represented in the actual policy and case law surrounding the question of the
customary.

To give a full review of the relevant case law and policy is beyond the scope
of this article.9 Notable developments with regard to the status of customary
law in South Africa include the successful legal challenge of the Communal
Land Rights Act 11 of 2004 (CLARA), an Act that, among other problems,
codified an erroneous and damaging supposed relationship between traditional
chiefs (often in the lineage of those appointed by the apartheid regime) and the
democratic governance of customary communities in an attempt to regulate
customary ownership.10 In Tongoane v The National Minister of Agriculture
and Land Affairs,11 the constitutionality of CLARA was challenged in the
High Court and the South African Constitutional Court in May 2010 upheld
the decision of the High Court on behalf of four customary communities.
The 2011 NDP, a far-reaching framework for long-term development in South
Africa, despite its insufficient recognition of many customary rights, at least
recognises that mining legislation must require collaboration and consultation
with the customary communities on whose land mining operations often
occur. And yet the status of customary law in South Africa is anything but
secure. As this article will demonstrate, there is a lack of consensus about
how customary law ought to be understood and theorised, particularly in
its relation to statutory law. Although Bhe v Khayelitsha Magistrate made it
clear that customary law must be considered of equal legal weight to statutory
law12 (and some scholars even argue that it is equal to common law), it’s often
the case that this is not recognised by legal officials particularly because
customary communities often lack the resources and knowledge of common
law to make their arguments intelligible and palatable to state officials. This
highlights not only the disempowerment of many customary communities but
also the troubling way in which customary communities are forced to engage
on terms which are, as is the case with the common law understanding of

8 M Chanock ‘Constitutionalism and the Customary’ (early draft) 4.
9 Such a review would include, among others, Bhe v Magistrate, Khayelitsha 2005 (1) SA 580
(CC); Alexkor (note 3 above); Shibi v Sithole 2005 (1) SA 580 (CC); South African Human Rights
Commission v President of the Republic of South Africa 2005 (1) SA 580 (CC), 2005 (1) BCLR
(1); MEC for Education, Kwazulu-Natal v Pillay 2008 (1) SA 474 (CC); Shilubana v Nwamitwa
2009 (2) SA 66 (CC); Privy Council in Amodu Tijani v The Secretary, Southern Nigeria [1921] 2
AC 399 (PC).
10 Claassens & Cousins (note 2 above) 5.
11 Tongoane v The National Minister of Agriculture and Land Affairs 2010 (6) SA 214 (CC).
12 The court writes, for example, that customary law ‘should be accommodated, not merely
tolerated, as part of South African Law’ Bhe (note 9 above) 17.
private property, incompatible with customary practices, in that case relating to communal land tenure.

Wicomb observes that the insensitive and even aggressive imposition of state law on customary communities tends to lead to one of two results:

on the one hand, the fixed, hierarchical system of state law that is intolerant to negotiated rules has sometimes stifled communities’ customary law into obscurity. On the other, the irreconcilability between the two systems often leads to a complete lack of local engagement with state law beyond the strictly formal, with communities choosing to ignore the state’s ‘rules’ as far as possible.13

This disassociation of law from the reality of people’s lives is perhaps, as Chanock writes, the fundamental hindrance in South Africa’s journey towards a functional democracy. He quotes social scientist Claude Ake who writes, ‘It is extremely alienating for people to live under a system of law which does not connect to their social experience; it gives a pervasive sense of helplessness amid a chaos of arbitrariness’.14 Ignorance or disregard of the nature of customary tenure systems led the apartheid government to establish chiefs who managed such communal land on behalf of ‘his’ people while the land itself was held in trust by an apartheid administrator, usually a minister, as blacks and coloureds could not own land. This legacy of this double hierarchy of trusteeship still troubles land policy in South Africa today as customary communities struggle to assert their own mechanisms of land allocation against the power of chiefs, sometimes the same ones appointed under apartheid.15 In fact, shockingly, the legal frameworks of traditional governance in post-apartheid South Africa, first the Traditional Leadership and Governance Framework Act and now the Traditional Affairs Bill, explicitly rely upon the spatial customary boundaries entrenched by the Bantu Authorities Act of 1915. Historian Maanda Mulaudzi in an address at the parliamentary workshop to mark the legacy of the 1913 Land Act explains, ‘rather than a continuation of pre-colonial institutions what we have is what Mahmood Mamdani (1996) calls “bureaucratic chieftainship” devoid of peer and especially popular constraint in the exercise of its power’.

It’s important to note, then, that the conflicts laid out in this article are not only academic. Customary communities in South Africa face deep challenges including but not limited to poverty, lack of infrastructure, lack of access to education and health care. The ongoing struggle of, for example, the Dwesa-Cwebe customary fishers to gain access to their own land in order to sustain basic food security is proof of what is at stake in this debate. Even the tensions that led to the Marikana massacre at Wonderkop mine on 16 August 2012, where police shot and killed 46 striking miners and their supporters, were ignited in part by the poor living conditions of mineworkers on disputed customary land

13 Wicomb (note 1 above) 3.
14 Chanock (note 8 above, citing Ake 178) 2.
15 Claassens & Cousins (note 2 above) 1.
that is currently the site of ongoing litigation.\textsuperscript{17} All this leads legal thinkers advocating for such communities to ask how customary systems can best be represented and understood such that the living standards of customary communities improve, without relying on narratives that deny legal power and dignity to the communities. This is a point of particular concern in a country still struggling with the legacy of colonial trusteeship, to which the ongoing use of the phrase ‘customary community’ in a sense points, despite the work Wicomb and others invest in recuperating it. Scholars, lawyers, and policymakers have taken up a diverse spectrum of discourses about customary law, the variety of the discourses rooted in a shared recognition of the flexible and ever-changing quality of customary law, including rights-based discourses,\textsuperscript{18} arguments about the rule of law,\textsuperscript{19} and arguments as divergent in content as international jurisprudence and universal human rights\textsuperscript{20} and neoliberal narratives of the development of human capital.\textsuperscript{21}

\section*{III Complexity and the Customary}

Wicomb, to her great credit, has represented customary communities in cases that have formed the backbone of contemporary jurisprudence about customary rights. These include the recent victory in the High Court, upheld by the Constitutional Court, on behalf of the Dwesa-Cwebe customary fishers.\textsuperscript{22} She also produces scholarship about the status of customary law in South Africa from the perspective of ‘complexity theory’, a school of thought focusing on systems whose meanings cannot be ethically captured by overarching, central principals. With regard to Wicomb’s work, which articulates a radically open conception of ‘living customary law’, one challenge of this article is to pin down an understanding of customary law that is sufficiently specific as to allow for analysis, but also to keep in play Wicomb’s conception of living customary law, which for her is defined by its resistance to definition. This parallels, as we have seen, a real debate among the South African legal community about whether customary law is reducible to certain discrete characteristics (communal land tenure, indigeneity, original practice with regard to culture, some combination thereof, etc) or whether it is possible and correct to litigate using some broader and constantly-shifting definition, including but also exceeding those characteristics, which cannot, therefore, be handed down from the state or by outside experts. To employ Wicomb’s understanding of the characteristics of customary law (which, it should again

\begin{footnotes}
\item [17] See A Claassens ‘Unaccountable Chiefs are a Recipe for a New Marikana’ BDLive (18 September 2012).
\item [18] Wicomb is one example.
\item [19] Chanock fits this description.
\item [20] For example, the African Commission in \textit{Centre for Minority Rights Development v Kenya} (2009) \textit{AHRLR} 75.
\item [21] The 2011 NDP, which this article will examine, is arguably one example.
\end{footnotes}
be noted, is increasingly recognised in jurisprudence at the highest level) is already to reject a definition of custom stemming from any particular element of customary law, such as land tenure, management of natural resources, or specific cultural practice, rich though the opportunities for analysis along any of these discrete lines might be. We will rather, like Wicomb and in line with contemporary jurisprudence, attempt to keep in play these and other various, shifting, but crucial components of living custom. In other words, although we will question in various ways Wicomb’s particular theoretical framework for addressing it, we affirm (along with the Constitutional Court in *Alexor*) her claim that no discrete characteristic, observed from above, can adequately and ethically capture the meaning of customary law in South Africa.

Wicomb is drawn to complexity theory, on her own account, as a way of accommodating an ethical framework laid out by French philosopher Jacques Derrida. Wicomb, therefore, uses the lexicon of what she calls ‘post-structuralism’ to evade the language of definition. She writes:

> the problem becomes an overtly ethical one: the ethical relation, defined in post-structural terms, is one that attempts to regard the difference of the other completely and equally. The other is not reduced to a mere object; rather there is regard for her subjectivity and otherness.

This is the basis of a non-violent relationship as violence is understood as any action that attempts to reduce the other and her identity, thereby asserting a description of the other upon her.

At the same time, ‘one can also not say nothing, as that would simply deny us the productivity of diversity in dealing with the complexities of humanity’. From Derrida, then, Wicomb gains a set of terms and arguments, but perhaps more importantly, a basic concern about the power structures that underlie the act of definition and boundary-creation. By bringing complexity theory to bear on a specifically Derridean concern about the violence of definition, Wicomb paradoxically proposes a descriptive vocabulary for something that she considers, as an ethical matter, undefinable, indescribable, and

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23 Note 3 above: ‘It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life … It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.’

24 See, for example, W Wicomb ‘Securing Women’s Customary Rights in Land: The Fallacy of Institutional Recognition’ (2013) *Acta Juridica* 68: ‘One should be weary of describing complex systems as if such a description could be exhaustive and, even worse, make predictions or formulate “solutions”’ based on such descriptions. If we accept that living customary law systems are complex, and I will argue below that those functioning properly are, then the very notion of separating and “codifying” aspects of that system – such as leadership structures or land administration functions – become problematic. The problem is not only in modelling certain aspects and setting those in stone, but artificially separating aspects of the system from the whole and granting these different functions different statuses by incorporating some into formal law and others not.’

even ‘unthinkable’. Wicomb takes the ‘fit’ of the theoretical union of Derridean thought and complexity theory as a given. We will be interested in understanding the unwritten claims about their compatibility that allow Wicomb’s work to make sense, but which also point to moments of potential disjunction, where complexity theory is insufficient to the ethical demand that Wicomb draws from Derrida.

Wicomb writes in her 2010 paper ‘Law as a Complex System’:

[the] theory of complex, adaptive systems has been linked with great success to the small-scale management of the commons. Self-organisation, self-governance and resilience as an emergent property of complex systems are all characteristics of small-scale common property situations.

It is this quality that she argues makes complexity theory a strong model for customary law particularly in regard to questions of land tenure. Wicomb writes, ‘the theory of complexity provides some of the tools needed to develop a complex notion of diversity’. The most important of these is the language of self-organisation and ‘auto-poeisis’. For Wicomb, ‘important implications of self-organisation are that it allows for structure – and as a result, meaning – without the necessary intervention of either an external designer of the system, or a point of origin (centre) able to dictate the meaning of the system’. She goes on:

[the] first implication is a result of the fact that organisation and structure emerges spontaneously from the interaction of the elements in the system, while the second is implied by the fact that the structure of the complex system is always changing in response to the changes in its environment (Cilliers 1998: 91).

Wicomb explains in later work:

It is very important to distinguish between complicated and complex systems especially since the term ‘complexity’ has become something of a buzzword in the academic world. For example, when a large number of factors influence a specific situation, the situation is easily described as ‘complex’. However, a system with a vast number of elements is not necessarily a complex system. What makes the system complex is the fact that the elements interact dynamically in a way that allows for the properties of that system to emerge, rather than the properties being captured in the elements themselves.

Beyond the practical implications of this theoretical frame, namely that cases have been successfully adjudicated using its principles, ‘[t]here is also a purely ethical reason for redefining the relationship between state and customary law … The other is not reduced to an object (in terms of the observer’s subjectivity) but there is regard for its subjectivity and otherness. This is the basis of a non-violent relation to the other’. Violence, she goes on to explain, ‘is defined as any action that attempts to reduce the other and its

27 Note 1 above 2.
28 Ibid.
29 Wicomb (note 25 above) 125.
30 Note 1 above 5.
identity, in other words, any attempt to assert a description of the other upon it.\(^{31}\) In a complex system, meaning is distributed across the system and cannot be captured from any sovereign vantage point, especially not one exterior to the system.

This epistemological claim is central to Wicomb's conception of customary law because it strikes at the heart of the state’s authority to codify it. Attempts to simplify the meaning of customary legal systems are necessarily unethical and hegemonic according to Wicomb because such attempts erase one of the central positive categories of customary law, namely that, ‘Self-organisation is the ability of a complex system to change its internal structure in order to adapt to and cope with its environment as a means of survival’.\(^{32}\) Examples like these help us understand why Wicomb considers complexity theory a fitting framework for responding to the ethical questions raised by Derrida.

As Wicomb draws together Derridean thought and complexity theory, an essential mediating figure in her work is Paul Cilliers, as reflected, as we have seen, in Wicomb’s own citations above. Cilliers is a complexity theorist whose work exactly reflects what Melinda Cooper calls in her ‘Genealogies of Resistance’, ‘resilience as a science of complex adaptive systems’.\(^{33}\) However, the theoretical union proposed by Cilliers and drawn forward by Wicomb between Derrida and complexity theory has been questioned by some scholars, and also intersects with ongoing debates over Derrida’s legacy and the application of his ideas. In *A Complexity Theory for Public Policy*, Gökтуğ Morçöl writes:

> according to Derrida, signs do not have inherent meanings … their meanings can be determined only when they are differentiated. In other words, the meaning of signs (words) can be determined only in relation to other signs. It is of course tempting to compare this with complexity theory’s insight that systems are made of relationships … The problem is that in Derrida’s view, differentiation is an endless process; the process never stops to constitute a meaningful whole, even temporarily. It is an endless ‘play of signifiers’ or a ‘language game’. Cillers argues that ‘Derrida’s concept of différance can be used to describe the dynamics of complex neural networks’, Cillers recognises that this play of signifiers does not constitute a meaningful whole: no recognisable and stable structure emerges from this play. He also recognises that complex systems do have recognisable and relatively stable – emergent – structural properties. Then these two are in conflict.

Of primary importance is Morçöl’s claim that the concept of the ‘whole’ we find in cybernetics is incompatible with Derridean *différance*. Wicomb claims through a reading of Derrida that to define is unethical and actually violent, the restriction of a system that defies spatialised understandings of how its identity ought to be understood into a deceptively stable shape. Adaptivity, the claim that complex customary communities will always find a way to respond and change when faced with new challenges, to the extent that this

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31 Ibid.
32 Ibid.
adaptation refers to internal structure, is Wicomb’s positive response to that threat. At stake in this argument about what customary communities can be is the ability of such communities to realise rights in accordance with the Bill of Rights without the interference of overly restrictive legislation. It is also a powerful argument about identity-creation and democracy that defies bureaucratisation.

However, even as complexity theory for Wicomb is a way to escape the spatialised logic of top-down identity creation, it too must always imagine itself as opposed to the state such that any curb on what ‘customary’ might mean implies violence and should be unequivocally rejected. In setting itself up in reference to this always-impending threat, complexity theory would seem to have the potential to respatialise itself in reference to a field of adversity, an external threat that dictates the space of the complex system in question. When this field of adversity is statutory law itself, and when this law articulates a set of boundaries that then must be understood as always potentially encroaching, the risk is that each customary system becomes reconstituted as a closed system, even a paranoid one. If what this allows us to describe is a system that is infinitely internally complex, complex in every sense, except at the level of the identification of the system, the community itself, this theoretical frame then might run into the problem of reification. So too will it have to contend with the actual reality that the identification of customary communities is anything but obvious given the historical breakdown and dispersion of customary cultures and customary land rights. The continued, controversial use of the Bantu Act borders in customary jurisprudence highlights the centrality of the question of boundaries to debates over the legal status of the ‘customary community’.

Wicomb addresses this problem when she writes:

if diversity is to be the productive notion able to stimulate meaning and complexity in society, it cannot be bound to a centralised system where the play of diversity is contained within the totality of the system. For diversity to be productive, for it to be able to play a role in developing complex societies, it must be allowed to influence the structure of meaning within which it [is] constituted – the play of diversity cannot be closed off.\footnote{Note 25 above 125.}

However, Wicomb continues to invoke assumed boundaries, for example, when she relies on notions of inside and outside in ‘Securing Women’s Customary Rights in Land’:

Externally, customary law systems should be distinguished from other legal systems, but the difference should not be emphasised to the extent of denying that these systems are equally relational. Customary law, common law and statute law are all elements of a greater complex system of legal relations. These should be allowed to engage dynamically to allow for meaningful rights and relationships to emerge.\footnote{Note 24 above 27.}

This ongoing reliance seems to be the result of an irreducible theoretical snarl – if the customary legal space is truly a complex system, then must its
boundaries not become so fluid that they cease to separate it from other legal spaces? Does this theoretical stance, then, not undermine the very existence of an autonomous customary legal space? We raise these questions now not only because they are relevant to Wicomb’s work as such, but also because they are questions that similarly plague Hayek’s reading of complexity theory, and as such they will be important points of encounter when we think about the implications of the theoretical proximity between Hayek’s work and Wicomb’s.

On these terms, even the use of the word ‘community’ as an identifier must be an open question. By ‘customary community’, we might mean, variously, a community living under a customary land tenure system, a community with a historical claim to a customary identity, either during the colonial or apartheid periods, or as Wicomb argues, a community that is defined by the adaptive and open characteristics of their law. To the extent that all these characterisations rely on a claim about the autonomy and therefore otherness of such communities, either legally or in a broader sense, the use of the term arguably retains elements of the historical legacy from which Wicomb tries to distance it. However, in the spirit of Wicomb’s work, this article continues to use the term ‘customary community’ with the hope of drawing in each instance on the productive weight of this open question. As this article will go on to argue, there are perhaps several reasons to question the status of the boundary between the state, or better the jurisdiction of statutory law, and the customary community. It will end by asking what it would mean to think that boundary on the level of legal institutions.

None of this is to say that Wicomb’s frame, which pits customary communities against the state in an almost spatialised sense, is unjustified – it is in many ways a theoretical parallel to the actual reality of the challenges that customary communities face. As has already been established, customary law, despite its status in the Constitution, is rarely recognised in practice as equal to statutory law. More concretely, though in an entirely related way, customary communities also suffer from high levels of poverty and lack of infrastructure and resources. The corruption that still stems from the imposition of chiefs as the supposed representatives of the communities to the state only add to this suspicion about state power on the part of many community members.

And yet I believe there is reason to be apprehensive about the deployment of complexity theory to respond to this situation. The roots of complexity theory as what Cooper calls ‘a methodology of power’ run deep. She argues, ‘the [contemporary] deployment of complex systems theory is perfectly in accord with the later philosophy of the Austrian neoliberal Friedrich von Hayek’. Indeed, as we will see, many of the hermeneutic questions we have raised for Wicomb’s work on complexity are equally pressing in Hayek’s writings, albeit referring to a different legal context. What happens, however, when these two legal contexts collide, as is arguably the case in contemporary South Africa?
Cooper’s work constitutes a call for thinkers of complexity theory, especially those interested in economic injustice, to consider anew their theoretical proximities to Hayekian neoliberalism. This article does not propose to take Cooper’s word for it, however, but rather to substantiate her point by way of close readings of our two thinkers of complexity, Wicomb and Hayek.

Wicomb places her work in the legacy to which Cooper refers, with a difference, when she writes:

the theory of complexity is not simply an acknowledgement that the world is a complicated thing, but rather, an acknowledgement that the forms of rationality that we inherited from the enlightenment era and that still forms the basis of academia, are inadequate in dealing with complexity. Using complexity theory, therefore, entails a paradigm shift. But this shift carries a risk: if we rely on complexity theory we must understand how, in a sense, radical such a reliance is. What is more, we must be careful not to extract from complexity simply those elements that are useful and ignore the sometimes ‘dangerous’ implications of the theory.\(^{38}\)

The question this theoretical reliance requires us to ask is whether certain implications – or perhaps bastardisations – of complexity theory as Hayek took it up in his refining of the neoliberal paradigms of his teacher, founder of neoliberalism, Ludwig von Mises, are being adequately thought through when in Wicomb’s influential conception of customary law at a moment where neoliberalism has become an active paradigm in South African development policy.

IV Neoliberalism as Legal Theory

Neoliberalism is often understood as a merely economic paradigm, an extension of free market capitalism.\(^{39}\) This understanding ignores the way in which neoliberalism came into being as a response to historically specific legal and political problems. Faced with the dual threat of Nazism on the one hand and socialism on the other, Austrian thinker Ludwig von Mises – trained first, notably, as a lawyer before taking on economic questions – began to espouse his theories in the early 1920s in Vienna. Central to his work was a rejection of the hubris of the modern state, the arrogant belief that a sovereign could plan an economy fully, understanding in advance the movement of markets and the response of subjects living in this tightly controlled space. This could, in Mises’s view, lead only to the violent imposition of values on the population.\(^{40}\) If for classic liberalism salus populi suprema lex esto, the safety or security of the people is the highest good, is the ruling principle,\(^{41}\) neoliberalism takes as its mission the limitation of the uncontrollable and expansive governmental energy that its founders consistently argue this maxim implies. In this vein, Mises repeatedly argues against all unnecessary ‘extension[s] of the spheres

38 Note 24 above 15.
39 See, for example, D Harvey A Brief History of Neoliberalism (2007).
41 This idea can be traced back to, for example, T Hobbes De Cive (1998) and J Locke Two Treatises on Government (2013), arguably the founding works of Anglo-liberalism.
of governmental activities'. This leads him to search for a structure of
governance that controls the tendency towards infinite governmentality that 
he sees in the modern democratic state. Neoliberalism, in short, should be 
understood as not merely an economic theory but actually a legal and political 
solution to a set of problems that bring together law, economics and politics.

Friedrich Hayek inherits from Mises, his teacher, the fundamental neoliberal paradigm that ‘there is no economic sovereign’. He writes in ‘The Use of Knowledge in Society’, for instance, ‘the data from which the economic calculus starts are never for the whole society “given” to a single mind which could work out the implications, and can never be so given’. His solution is the price mechanism, which acts within the market space as a blueprint that is the negation of all ‘consciously formed blueprints’. In a nod to pre-cybernetic complexity theory, he even writes of the price mechanism as a ‘telecommunications device’, a mechanism through which we can make sense of a system where meaning is distributed and not located in a sovereign vantage point. To this end, Hayek justifies the subsumption of even the most intimate elements of human existence under the purview of the price mechanism through the aggressive imposition of the concept of human capital.

If it is the case, as Hayek insists when he casts himself as the hero in an unfolding socialist tragedy, dedicating The Road to Serfdom, ‘To the socialists of all parties’, that hubris – overly robust claims of knowledge – is fatal in governance, it must also be the case that knowledge of a kind, in a limited dose is necessary for the founding and functioning of the market. Hayek’s inquiry into the sources of knowledge, which led him to a sustained study of complexity theory especially during the second half of his career, is symptomatic of the difficulties of articulating how those limits should operate. When he titles his 1945 essay ‘The Use of Knowledge in Society’, it is in reference to a set of implicit questions and a desire to articulate and therefore control the terms of the debate. How do we use knowledge in society and how ought we? From where does knowledge originate and who ought to wield it? In fact, Hayek used the language of complexity repeatedly to baffle

42 Note 40 above 19.
45 FA Hayek & B Caldwell The Road to Serfdom (2007) 85.
46 Ibid.

‘The capital structure, as described by Hayek and the Austrians, has the necessary elements to be seen as an adaptive classifying system. The “map” aspect of the capital structure can be seen as actual capital goods and the physical production possibilities frontier they represent. In the easier case of machinery, this would be the physical, engineering capabilities of a particular machine. For human capital, it would be the capabilities represented by the skills, experience, and knowledge of the person in question.’
the problem of sovereign knowledge and power, for example, in his 1967 essay titled ‘The Theory of Complex Phenomena’.

As Hayek took up the problem of epistemology, the study of the origins of knowledge, in this later work, he sought to, ‘reestablish the ontological foundations of his philosophy on the grounds of the new complex systems theory’. This is reason enough to acknowledge and reflect upon, as Cooper argues, ‘the proximity between the emergent discourse of “resilience” – as in Wicomb – “and contemporary neoliberal doctrines” and the effects of that proximity. Complexity theorist J Barkley Rosser argues:

inspired by the socialist calculation debate, Hayek stressed the reality of how knowledge is dispersed among agents in the economy, and how, nevertheless, market order emerges from the interaction of these agents in this dispersed system. Both Lavoie (1989) and Vriend (2002) emphasize this issue as central to Hayek’s complexity viewpoint, as do Caldwell (2004) and Gaus (2006). While Hayek basically developed this idea with little direct input from complexity theorists, it would appear that this idea was what most strongly motivated his study of cybernetics and general systems theory, which provided models of autopoetically self-sustaining systems and anagenetic emergence of order.

This understanding of spontaneous order is central in Hayekian epistemology, driving his rejection of the figure of the liberal sovereign as well as his particular conception of the function of the price mechanism. In a chapter titled ‘A Postscript on the Role of “Laws” in the Theory of Complex Phenomena’, Hayek argues that complex networks theory allows us to imagine a legal space where meaning exceeds that which can be determined by law or general rule, writing, ‘we may well have achieved a very elaborate and quite useful theory about some kind of complex phenomenon and yet have to admit that we do not know of a single law, in the ordinary sense of the word, which this kind of phenomenon obeys.’

Though proponents of complexity theory might criticise the way in which neoliberal theorist Friedrich Hayek used the vocabulary of complex systems, they must still take seriously the possibility that Hayekian neoliberalism was and is a good faith attempt, surely the most influential in history, to use complexity theory to generate a paradigm for legal and political experience, the mediation of liberal sovereign excess, and the management of the commons.

When complexity theory is brought to bear on questions of customary law, as in Wicomb’s work, it employs epistemological claims that resonate with those espoused by Hayek, most basically that it is impossible to capture the meaning of a complex system from one sovereign, planned, perspective, and, it follows, that to attempt to do so necessarily entails and generates violence on an epistemological and substantial level. When Wicomb asks her Derridean legal question, ‘how do we write legislation able to accommodate and regulate

49 Ibid 376.
the unthinkable?", we can hear the echo of Hayek’s search within complex systems theory for a blueprint that is the negation of all ‘consciously formed blueprints’. Not merely a descriptive horizon, complexity theory in Wicomb’s work offers a set of ethical stakes as well. It worries about how government intervention imposes values on complex systems whose values are unknowable to the sovereign who imposes government planning. It defends the emergence of spontaneous order as an antidote to this potential act of hegemonic violence. In this register, too, we can hear resonances with Hayek’s polemics against the liberal state and his defence in *The Fatal Conceit: The Errors of Socialism* of what he calls ‘extended order’: ‘widely dispersed information that no central planning agency, let alone any individual, could know as a whole, possess or control’.

Here a counter-claim can be anticipated: customary law, though it often has economic stipulations broadly speaking within its purview – an understanding of the status of property and access to means of production, for example – is not strictly economic, separating it fundamentally from the theoretical horizon out of which the neoliberal paradigm emerges. However, as we have seen, neoliberalism itself is not merely economic but rather a response to a set of juridical problems that employs the market as a specific form of governance. From this perspective, it is clear that customary communities are in the position of responding to exactly the kinds of excesses of liberalism that neoliberalism warns us about, namely the dual problem of an over-proliferation of despotic and colonialist administrative law and a sustained unwillingness to engage with the values, knowledge, and legal norms of local communities. This is very clearly Wicomb’s concern – she is, after all, a thinker of the abuses of apartheid and the many remnants of these abuses within customary land policy and elsewhere. It is a concern that we see playing out in the plights of customary communities all over South Africa. Given this shared trepidation, taking the 2011 South African NDP, Recapitalisation and Development Programme (RADP), and related legislation as its starting point, this article will begin to reflect on the vulnerability of customary communities to a certain kind of neoliberal logic, by virtue of reliance on an understanding of customary law rooted in the same logic and fear from which neoliberalism gains its energy.

This seems historically necessary at a moment where neoliberalism has taken firm hold in South Africa, and on a global scale, in the economies of many of the countries with whom South Africa does business. Patrick Bond describes the status of neoliberalism in *Elite Transition: From Apartheid to Neoliberalism in South Africa* as ‘official neoliberalism – by which is meant adherence to free market economic principles, bolstered by the narrowest practical definition of democracy (not the radical emancipatory project many ANC cadres had

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52 Note 26 above.
53 Hayek & Caldwell (note 45 above) 85.
Although this article rejects the conflation of neoliberalism with simple ‘free market principles’, Bond’s analysis at least offers a vocabulary for understanding neoliberalism in the context of a strong government state, where the government is often responsible for the implementation of market forces in a way that, on the terms of neoliberal theory, seems self-defeating, arguably ‘amplify[ing] rather than correct[ing] apartheid capitalism’s main economic distortions’. 56 The NDP, in the way it combines government intervention with neoliberal logic, will serve as a short case study in how this problem might unfold and what its risks are when it comes to the realisation of rights.57

V  NEOLIBERALISM AND THE NDP

In November 2011, the National Planning Commission released their ‘vision for 2030’, 58 the NDP, in order to make recommendations about how South Africa ought to combat poverty, land inequity, and an underperforming economy. The NDP provides ‘specific proposals to raise agricultural production and effect land reform in a way that focuses on the capabilities of farmers and communities to earn an income, rather than just redistributing land.’ 59 It also makes recommendations about land tenure in communal areas that, for example hope to, ‘balance traditional authority with greater certainty for female-headed households to invest in farming’, a constant worry with regard to customary systems. 60 Though the NDP claims to be comprehensive, its primarily economic focus limits the potential for its development recommendations to be democratic and locally generated, or for the right to social and cultural development to be given full weight. The NDP is not policy or law, and its recommendations will act more as a political reference point than a binding mandate, and yet it is precisely because of the breadth of the report, the way it purports to tell a story, that it provides such a substantial opportunity to observe the prevalence of certain narratives and vocabularies in contemporary South Africa. The approach of the National Planning Commission in crafting the plan purports to be holistic and yet consistently focuses on developing economic opportunities for the ‘capabilities’ of persons understood as individualised units of ‘human capital’. 61 The NDP is very clear that opportunities ought to be provided for people to live the lives they are capable of – ‘At the core of this plan is a focus on capabilities’ 62 – which correlates strongly within the NDP, and is perhaps even used interchangeably with the lives they desire since the understanding of development at play ‘draw[s] strongly from definitions of development that focus on creating

56 Ibid 15.
59 Ibid 419.
60 Ibid.
61 Ibid 5.
62 Ibid foreword.
the conditions, opportunities and capabilities that enable people to lead the lives that they desire. The understanding of the person laid out is highly individualised, a unit of ‘human capital’ who pursues the ends that any other reasonable and competitive individual would also inevitably choose in the same situation, and who follows a predictable and maximally efficient model of self-development. He is, to borrow the language of neoliberalism, an entrepreneur of the self, rational to the extent that he is in accordance with a particular economic rationality. No matter what understanding of ‘peoples’ we employ, it’s difficult to conceptualise him as a community member. He rejects the old ‘paradigm of entitlement’ (language that is certainly not accidental, given the context of the reopening of the land claims process through the 2013 Restitution of Land Rights Amendment Bill) in favour of a model based around opportunity. But does he have rights? In chapter 6, the authors state almost regretfully:

Unrealistic expectations have been created by promises of rights. Natural resources are limited and probably already fully exploited or even over-exploited. Small-scale fisheries cannot be regarded as a way to boost employment. Industrial capital-intensive fisheries offer better salaries and better conditions of employment, and are more transformed than small-scale low-capital fisheries. Reducing the rights allocated to industrial fisheries to award them small-scale operations simply cuts jobs. There is a serious need for research to determine the relative values of different sectors in terms of employment, salaries and conditions of service, and contributions to tax.

Despite the fact that at the recent parliamentary workshop on Land Reform, Nick Vink, a member of National Planning Commissioner Mohammed Karaaunun’s sub-committee, argued for a rights-based approach, arguing that farmers ought to have both land rights and ‘rights to markets’, rights are relegated to something desirable but impractical within the NDP. This must be partially explained by the way in which the economic model employed relies on rapid growth under ‘ideal conditions’.

Rural land use, particularly that land held under communal tenure, is a problem in the NDP for many of the same reasons. The Commission writes that, ‘a difficult but important issue is the challenge of land tenure and governance in former homeland areas, where large areas of high-potential agricultural land remain grossly underutilised,’ picking up on rhetoric also used in the new Restitution of Land Rights Amendment Bill, that rights to the land are linked to the capabilities and the ability to use the land productively. One question in this case is whether ‘productivity’ implies maximum productivity given how much of the NDP is concerned with land itself being

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63 Ibid 5.
64 Ibid.
65 Ibid 209.
67 NDP (note 58 above) 203.
68 Ibid 241.
underdeveloped, especially within the agricultural sector. The NDP rebuffs those who treat land access in communal areas:

as though land rights and the use of different forms of land are undifferentiated. In practice, land rights for agricultural purposes differ depending on how people use the land. Securing tenure for investment is important when land is used to grow crops. The focus should be on cooperating with traditional leaders in securing tenured irrigable land that will lead to fully defined property rights, which allows for development and gives prospective financiers the security they require.69

If the right to tenure security is based on what the land is used for, it is also difficult to imagine how such a system could accommodate communities living under land tenure systems that are not themselves based on a model of private ownership, as is the case in many customary communities. The NDP promises to ‘[i]nvestigate the possibility of flexible systems of land use for different kinds of farming on communal lands’70 but seems suspicious of locating such an investigation itself locally. When it writes that, ‘creating jobs in agriculture will not be easy … The effectiveness of extension officers depends on performance, capacity and level of priority given by provincial agricultural departments. Whether this service is correctly located should also be considered’71 it seems to imply that it would be more effective, even easier, to take decisions out of the hands of local authorities. To the extent that this means questioning the powers of undemocratic or corrupt traditional leaders, this could be a means of making development policy more democratic, but to the extent that it means removing power and mechanisms of accountability even further from the hands of those living in rural areas under customary systems, delocalising the ‘leadership needed to drive implementation’,72 it is a rhetoric to be wary of.73 Similarly, the NDP ‘[o]ffers white commercial farmers and organised industry bodies the opportunity to significantly contribute to the success of black farmers through mentorships, chain integration, preferential procurement and meaningful skills transfer’.74 This is a similar strategy to the one promoted by the recent RADP through their ‘strategic partnerships’.75 However, the NDP, like the RADP makes aggressive assumptions about the desires of local communities when it comes to job creation – that because they want jobs, they want whatever jobs fit most neatly into a larger plan for the South African economy.

The plan does show some awareness of the differentiated nature of rural development, arguing that, ‘some places justif[y] high investment because

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69 Ibid 200.
70 Ibid 205.
71 Ibid 198.
72 Ibid 10.
73 See also ‘Institutional capacity is integral to success, especially in the reforms required to resolve contested relationships between indigenous and constitutional institutions’. Ibid 196. And ‘Additional difficulties for the planning system include: ambiguity and contest around the developmental role of traditional authorities’. Ibid 244.
74 Ibid 206.
of social need and development potential’. Indeed, the Green Paper, which preceded the NDP, says that, ‘in pursuit of agrarian transformation, the link between the land question and agriculture is acknowledged as the basis of the search for an economic rationale and a vision of a post-reform agrarian structure. Yet, demand for land may be for other productive but non-agricultural uses’. However, it’s difficult to imagine where such an understanding fits into the substance of NDP proposals, particularly as this idea of productivity evolves into legislation like the Restitution of Land Rights Amendment Bill, unless to mean that rural land is ripe for other kinds of exploitation, like mining or extraction of other resources. The call for ‘mutual sacrifice’ for longer term benefits also seems to mask the possibility that it is the rural poor who will bear the brunt, perhaps without consent as the African Commission understands it at least, of difficulties caused by the restructuring of their local economies, even to the point, albeit in ‘extreme cases’, of measures like ‘promot[ing] out-migration’. Though this may be for their own good, or at least for the good of their economies, South Africa has a powerful colonial and post-colonial legacy lending weight to a suspicion about such a claim, especially since the African Union’s Framework and Guidelines on Land Policy in Africa reminds us, ‘structures governing access, control and management of land are as much about the consolidation of democracy as they are about asset stewardship’.

The NDP wreaks similar havoc on the question of culture, often asking working-age community members to leave (even implicitly, by their purported own choice, after investing in housing closer to the train tracks into town, etc) in favour of a system of remittances. This could have a devastating effect on customary culture, supplementary cultural development initiatives notwithstanding. This focus is symptomatic of the inability, one the neoliberal thinkers certainly share, to think through cultural development, or what the Commission calls ‘social cohesion’, as anything other than a function of a specific conception of a successful economy.

The potential, then, for economic logic to drown out other methods of determining ‘values’ broadly speaking, is obvious. Customary communities might be especially vulnerable. And yet if we take the history of Hayekian neoliberal legal theory seriously, the justification for such a monopoly over the method of calculating values was precisely to avoid a greater evil, a state administrative apparatus run amok to the point of totalitarianism. From this perspective, it seems crucial to prepare from a theoretical perspective for the moment where the market capitalises on a shared anxiety and says ‘if what you, the customary community, wants is a secure and empty space in which
your own law is protected from the onslaught of statutory law, which would
dominate your own, reducing your complexity to that which is intelligible to
the legal norms handed down from a European legal tradition, the market can
provide that space better than the government can. In fact, it was specially
designed, on an epistemological level and in a particular historical context,
precisely to do so’. If complexity theory as a paradigm for the customary
community is not explicitly conscious of its theoretical proximity to Hayekian
neoliberalism, it is unprepared to answer this challenge, to the detriment of
the very communities on behalf of whom it hopes to advocate.

VI Thinking the Boundaries

What would it mean, then, to think neoliberalism in South Africa, especially
with regard to customary policy? It would, first of all and most concretely,
mean being attentive to the desperate material conditions of many of those
living in customary communities. It would require asking whether and how
those conditions are sustained in recent years by neoliberal legal norms that
promise high living standards for all yet nevertheless disregard economic rights
and exploit those who are already disadvantaged. Most of all, it would mean
remembering that the enemy of my enemy is not necessarily my friend – just
because the neoliberal market is premised on the limitation of governmental
intrusion does not mean that it is an adequate or desirable replacement for
well-planned state intervention and legislation, written in consultation
with communities, when it comes to the realisation of rights. Among other
considerations, this requires considerable creativity in how we think about
the appropriate limiting principles on state administration, recognising the
neoliberal answer, which conflates all governmental activity with the tendency
towards totalitarianism, as insufficient and harmful. Rather than conceding to
Hayek that the market is value-neutral and negative with regard to sovereignty
and power (as his iteration of complexity theory suggests), the legal community
must take more seriously the active and harmful effects of neoliberal policies
and employ substantial critiques of neoliberalism in litigation on these issues.
Ultimately, rather than reserving the space of customary law as an unqualified
‘complex space’, thereby leaving it especially vulnerable to subsumption
under neoliberal logic, we must think the boundaries that complexity theory
relies upon but must disown, considering anew the place of customary law
within the broader South African legal system.

Another way of putting this is that our critiques of neoliberal complexity
do not make the concerns that Wicomb draws from French thinker Jacques
Derrida any less pressing or relevant. Derridean ethics, on Wicomb’s terms,
require us to step back periodically and be newly attentive to the remnants of
spatial thinking that persist in our theoretical constructs (an injunction to which
neoliberal thinking, despite its employment of complexity, fails to respond).
As we have pointed out before, complexity theory allows us to theorise
systems that are endlessly dynamic except for at the level of the identification
of the system. Customary policy must not fall prey to this theoretical snarl.
Communication across the boundary of customary and statutory law ought to be the direct object of inquiry, perhaps up to and including the point where the boundary itself begins to dissolve.

Wicomb, in fact, says as much in her 2010 paper titled ‘Customary law as an open, adaptive system’.

This paper stands out within her body of work because of its unmediated engagement with Derrida rather than with Derridean complexity theory. Wicomb directly addresses the question of the deceptively closed system of ‘free play’. She writes:

it could be argued that a customary law system must be an open system, because for it to be able to survive within a new constitutional dispensation, it will need to transform substantially – or become untenable. We must therefore be able to regulate customary law in a way that removes any organising principle or structure able to dictate what is in and what is out – therefore precluding any possibility of substantive transformation.

The question of boundaries then becomes urgent – can customary legal communities retain their legal status as autonomous, or does this conception of customary law as truly open actually spell out the dissolution of any particular separation between statutory and customary law? Tellingly, Wicomb ends this brief but crucial text by asking what form of constitutional land dispensation mechanism – or, more generally, legal structure – might possibly meet this challenge.

Wicomb directs her attention towards this problem in the final sentence of her paper when she writes:

this could mean that customary law is able to function effectively as an open system with no organising principle – that which Derrida calls ‘the unthinkable’. The question is, how do we write legislation able to accommodate and regulate the unthinkable?

The Derridean impasse, both impossible and necessary, now turns advocates of customary law towards the question of engagement at the shifting boundaries of various legal communities within legislation and litigation. Of particular interest for this article is legislation such as the hotly contested Traditional Courts Bill, legislation that inaugurates new forms of legal institutions for customary communities. Using this line of thought as a guide, we can argue that such a court would need to have a kind of modesty – but, critically, as we think about the role of neoliberal logic within the South African legal system, not austerity – imbued in it, an acknowledgement of its own limitations and of the basic untranslatability of and between legal orders.

VII Conclusion

It may seem strange to end this article with a discussion of legal institutions, a topic that has not, so far, been central to the inquiry. However, if the goal has been to trace the life of a theoretical framework in as-close-as-possible to real time, it’s noteworthy that we’ve arrived on those terms at a question that is
currently central in broader debates over the legal status of customary law in South Africa. The battle over access to judicial remedy, and especially debate over the form of the courts available to customary communities, is clearly a major frontier of contemporary legal activism involving customary law. Evidence for this claim includes the recent controversy over the Traditional Courts Bill, an attempt to further institutionalise the damaging conflation of chiefly authority and democratic governance in customary communities. The Bill had been returned by the National Council of Provinces to the hands of local communities for further consideration after the Bill was roundly criticised for creating a ‘second-tier’ legal system that leaves those who are least legally empowered especially vulnerable to abuse. In March 2014, the Bill lapsed, and now something new must come to take its place.

On the terms of this article, this is an encouraging state of affairs. In ‘The Complexity of Difference, Ethics and the Law’, Wicomb writes:

A complex understanding accepts that the tension between diversity and inclusion is indeed not a problem to be solved. Approaching diversity as a complex system is thus an acknowledgment that we could never have the last word and therefore even our understanding of humans as law subjects should be open to the dynamics of human diversity.

As South Africa takes up the challenge of mediating conflicts of genuine diversity, the goal must be to create new kinds of legal institutions and mechanisms, courts and other forms empowered by the Constitution. Such institutions must be suited not to solve the problem of the boundary of customary and statutory law, but rather to mediate and pursue justice without recourse to hegemonic interference on the one hand or the hatred of sovereign institutions that sustains unregulated neoliberal capitalism on the other.

85 Note 25 above 127.