Law as a complex system: facilitating meaningful engagement between state law and living customary law

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The question of the appropriate accommodation of living customary law by state law and institutions has become central to the question of the governance and sustainable existence of communal property in South Africa. This is the result of the development of jurisprudence in South Africa that increasingly acknowledges customary rights as the basis of the continued protection and promotion of the rights of rural communities to access communal land and resources. Unfortunately, post-apartheid state law and institutions do not reflect these developments, thereby effectively excluding many poor rural communities from the commons as their customary rights are ignored. The reluctance to properly accommodate customary law is partly based on the difficulty to identify and give content to customary law as a system and partly on the fact that many of the concepts of customary law – indeed the very understanding of law itself – are foreign to and even irreconcilable with the semantics of state law. In addition, the fluid nature of customary law runs contrary to positivist notions of the law and the paper discussed a couple of instances where courts were faced with this difficult reconciliation. The issue of the facilitation of a meaningful engagement between state and customary law is significant in terms of both access to the commons and in terms of the eventual governance of common property. This paper will argue that the theory of complexity is useful not only for our understanding and description of the elusive customary law system, but also in understanding how state law can accommodate customary law in a way that allows for the customary system to operate as the open and adaptive system that it is. The issues of legal certainty and power will be addressed specifically as they arise in a comparison between state and customary law systems.
Customary law, complexity theory, constitutional law, meaning, power, ethics

1. Introduction

The destructive impact of colonisation upon the societal and legal structures of many indigenous and customary communities in Africa, Australia and elsewhere, has all but become general scholarly wisdom. As a result, the debate as to how customary law may be 'reinstated' to play the regulating role that it did in pre-colonial times, is raging. One obvious difficulty with such an attempt is the fact that state law came to stay. Any attempt to 'resuscitate' customary law must therefore include reflection upon how customary law and state law may co-exist.

This paper investigates the possibility of the theory of complex systems to assist us in understanding not only the nature of customary law as a system, but more importantly, what the implications would be for the appropriate accommodation of customary law as a rightful source of state law.

A qualification is in order, however: it is of course a fiction that there is such a thing as a homogenous African culture or even a single identifiable body of law that represents customary law. On the contrary; African cultures vary not only from country to country, but

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even within countries (quite notoriously so) and therefore I do not pretend to describe African customary law here (or anywhere) exhaustively. The changing nature of customary law makes this admission even more necessary. At the same time, our acknowledgement of the complexity and heterogeneity of a phenomenon such as African culture, should not preclude us from responsibly and self consciously referring to some characteristics identified as common amongst most or even many African customary law systems. Complexity should not mean that we can say or do nothing. If, therefore, I refer to the characteristics of customary law in this paper, it is with the acknowledgement that the description is provisional and far from exhaustive.

In addition, the paper deals specifically with the attempts of the South African legislator to accommodate customary law and therefore to a large extent limited to descriptions of customary law as found in South Africa.

The paper is set against the background of the successful legal challenge of the Communal Land Rights Act 11 of 2004 (CLARA) by four rural communities in South Africa. In *Tongoane and others v The National Minister of Agriculture and Land Affairs and others*2 the constitutionality of CLARA was successfully challenged in the High Court and was confirmed by the South African Constitutional Court in May 2010.

The question of the appropriate accommodation of customary law is an important one on various levels. In South Africa, at least, customary law has an impact on the lives of an estimated 21 million people or nearly half of the population. These numbers are even higher in many other African countries: this despite the fact that in various African countries, customary law was repealed by post-colonial governments.

On a practical level, it has been observed that an insensitive imposition of state law upon customary law communities leads to one of two outcomes: 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. In countries such as Ethiopia where customary law was entirely repealed, rural communities are forced to regulate their lives outside the only legal system that can provide recognised and regulated protection by formal courts.

There is also a purely ethical reason for redefining the relationship between state and customary law. A number of poststructural and post-colonial philosophers3 – including philosophers of law - have redefined the ethical relation as one that attempts to regard the difference of the other4 completely and equally. The other is not reduced to an object (in

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2 Tongoane and others v The National Minister for Agriculture and Land Affairs and others, 11678/2006 (NGHC October 30, 2009) http://www.lrc.org.za/images/stories/Judgments/20091030151846273.pdf

3 For example Emmanuel Levinas, Jacques Derrida and Drucilla Cornel.

4 The Other as a philosophical term is often associated with the work of Emmanuel Levinas. Once the subject lost its central position, the subject-object relation became problematic. The object could no longer be understood in terms of the subject. This led Levinas to call the object the 'Other', to articulate his understanding of this object as being completely other and therefore outside the

terms of my subjectivity) but there is regard for its subjectivity and otherness. This is the basis of a non-violent relation to the other. Violence itself is defined as any action that attempts to reduce the other and its identity, in other words, any attempt to assert a description of the other upon it.

State law cannot accommodate customary law by understanding it in terms of its own concepts of, for example, ownership thereby denying the customary law system its 'otherness'. Worst still, state law often reduces its interpretation of customary law to a few common denominators and devises a workable relationship upon that basis. To be ethical, state law must be able to accommodate customary law *in its difference*.

Promoting difference has an equally pragmatic advantage: a multitude of group identities – whether it is conceived as cultural, ethnic, national or even sub-cultural identity – can contribute to a more complex community. If group identities and the meaning they provide were to disappear, there would be no way to ensure that the community does not become more homogenous. Members of the community would have fewer differences between them and it would therefore exhibit less diversity.5 A complex community provides for richer interaction between the members of the community, precisely as a result of the multitude of differences between them. The richer the interactions are, the more meaning can be created. Put simply, the more opinions we have on a certain issue, the more material we have from which to formulate an informed position. That would mean that for each problem posed we have a diverse number of potential solutions.

Having just one, simple answer to every question works well when the questions themselves are simple – or in the unlikely event that the single answer turned out to be the 'best' one. But we live in a society where the questions and issues themselves have become so complex, that simple answers are inadequate.

At the same time, an over-emphasis on the difference runs the danger of disregarding the identity or sameness that groups share. Identity is implied by difference because it is impossible to speak about the difference between two things if they were absolutely different. There needs to be an element of identity in order to give content to difference6 (see Cilliers 2005:5). In other words, we can give content to the difference between a saxophone and a clarinet, because they share the identity of musical instruments. It would be difficult, however, to speak meaningfully about the difference between a saxophone and a brick, because it would be hard to identify their sameness.

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system. As Gibson explains, "...the other whom I encounter is always radically in excess of what my ego, cognitive powers, consciousness or intuitions would make of her or him. The other always and definitively overflows the frame in which I would seek to enclose the other". Seeking to enclose the other in such a frame is committing violence and thus being unethical.

5 This position runs contrary to the modernist worldview that preferred homogeneity and simplicity. As Bauman (1992:xiii) describes: "When seen from the watchtowers of the new ambitious powers [enlightened modern rulers], diversity looked more like chaos, scepticism like ineptitude, tolerance like subversion. Certainty, orderliness, homogeneity became the orders of the day".

6 Cilliers, Paul. 2005. 'Difference, Identity and Complexity'. Paper delivered at the conference Complexity, Science and Society. September 11-14, 2005. The University of Liverpool Centre for Complexity Research, p 5.

If there is nothing that we share, there is no basis for cross-fertilisation. Clearly, while customary law and state law systems differ fundamentally, they are also the same at least in the sense that they represent systems of rules that regulate the lives of individuals and communities. This acknowledgement allows us to affirm the important tension between identity and difference.7

Finally, the South Africa Constitution8 explicitly recognises and protects customary law – which encompasses living customary law - and there is therefore a legal imperative upon the South Africa legislator to accommodate it.

2. The nature of customary law

The accommodation of customary law is complicated by what we may call the nature of customary law. It has never been easy to define these systems.

Mnisi9 argues that claims made concerning the definition of customary law often range between two positions. On the one hand it is argued that 'customary law is not customary' and that there is, in fact, no longer a customary form of law in existence. These 'progressivists' assert that it is also impossible to return to any pre-colonial form of customary law as the nature of custom assumes evolution and the path of customs' 'genuine' evolution cannot, in view of the manner in which the process was tainted by colonial influence, be extricated or even speculated.10 They therefore argue for customary law to be developed (by the courts) in a manner unconstrained by its historical and contemporary social existence and dictated by the Constitution.

Others contend that there does exist a system of customary law, but it is one tainted by colonial interference. There is, however, a pure customary law, they argue, that, if searched for, can be traced back to its indigenous origins and that this is what we should aim to reinstate as customary law.11

While opposing each other, the two arguments are essentially based on the same premise: that change corrupts and inflames a legal system even to the point of destroying it. Both positions

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7 In the context of multi-culturalism, Johan Degenaar (1993:53) wrote: "Both notions [of identities in the plural and the singular] should be acknowledged and the tension between them kept alive. If, on the one hand, one views humanity as consisting only of distinct cultural groups, it leads to an exclusivist notion of 'cultures as bounded wholes' and contact between cultures becomes difficult if not impossible. If, on the other hand, one only operates with the notion of culture in a universalist sense, it leads to the denial of the rich texture of cultural variety. I propose that we view culture in both plural and singular terms, and discover how our understanding of culture (and, I would add, of ourselves) is enriched by the tension between them".

7 Section 211(3).

8 Mnisi, Sindiso Unpublished dissertation, University of Oxford Cape Town 2007.

9 Mnisi (n 4 above) 4-5.

10 As above.

thus see customary law as a unitary and original body of law that existed at a point in time in the past, but not in the present.

Where they differ is in their approach to this inevitability: the first group believes that we can never return to find that original and untainted body, while the traditionalists believe it can and should be traced – and reinstated in its original, essential form.

As other theorists, this paper is critical of these approaches that understand customary law as a unified and static body of law that existed at a certain point in history – whether it can be restored or not.

We rather agree with Mnisi and others in their acknowledgment of 'living customary law' which should be distinguished from official customary law. To quote Mnisi,12 living customary law is a 'manifestation of customary law that is observed by rural communities, attested to by parol. Although the term 'living customary law' gives the impression of a singular, unified legal system being the referent, this term actually points to a conglomerate of varying, localised systems of law observed by numerous communities'.13 Official customary law is that which is denoted by state law. She further argues that customary law as protected by the South African Constitution refers to both official and living customary law.

3. Customary law and the Courts

The Constitutional Court of South Africa has affirmed this distinction between official and living customary law: it has stressed the importance of observing what actually happens in practice, and not simply relying on official versions of the law.14 This involves the study of the usages of the particular community in each case. "Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading".15

Australian courts have also been asked to formulate an understanding of customary law in relation to the common law. In 2004, the Yorta Yorta Aboriginal Community appealed to the

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11 N 4 above 15, footnote 23.

12 As above.

13 *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) at [111]. In the Richtersveld case the court has pointed out that the "living" customary law is in a constant state of development and adaptation to changing circumstances and needs... *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) at [53].

14 On "living" customary law, see *Alexkor Ltd and Another v The Richtersveld Community and Others* above at paras 52 - 53; *Bhe and Others v Magistrate, Khayelitsha, and Others* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) (2005 (1) BCLR 1) at para 87, 109 - 112; *MEC for Education, Kwazulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) at para 153; *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 46.
Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at [404]; approved in *Alexkor* at [56]; and see also the judgment of Ngcobo J in *Bhe* at [156].

Australian High Court for the recognition of their land claim under the Native Titles Act.16 In its decision, the High Court of Australia pitted the approach of the Court of first instance, namely to require positive proof of continuous acknowledgment and observance of positive law, against the approach argued for by the community: that attention should be focussed on 'the rights and interests presently possessed under traditional laws presently acknowledged', therefore a present connection to these laws and customs.

The divergence in these two approaches becomes particularly important when the Court, on appeal, turns to the question of what it calls the 'intersection' of traditional laws and customs with the common law. Citing *Fejo v Northern Territory*, it is asserted that 'Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law'.

The Court, in *Yorta Yorta*, believed that the following questions were at the heart of their problem:

> *Exactly where does the intersection between customary and common law occur?*
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> *What is this that intersects with the common law? Is it the body of traditional law as it exists today? Or is it somehow connected to that body of law at the time of sovereignty?*
>
> *And most importantly: how, if at all, is account to be taken of the inescapable fact that since, and as a result of, European settlement, indigenous societies have seen very great change?*

Two observations may be made about the Court's approach. Firstly, the question of law in past and present is not asked about common law – clearly a system of law that is understood as static. That is, the Court has no problem establishing how to define common law at the time of intersection, perhaps because whether it is at the time of sovereignty or at present, it is always 'the same'. [or because, although it changes, it happens at a slow pace and can therefore be described exhaustively at all times]

Secondly, it is assumed that the intersection between the two systems may be found at an identifiable point, an assumption that clearly disregards the significance of the changing nature of customary law.

It is further interesting to compare the progressivist and traditionalist notions with that of the Court in *Yorta Yorta*. While the Court's questions indicate that it does not understand change as fatal for a customary law system, it still believes that a snapshot of the system at a particular point in time must be distilled in order to be able to find the 'point of intersection' with common law. In other words, one must at least be able to define the customary law system exhaustively at a certain point in time – whether pre-colonial or in the present – if one is to seek a point of intersection with common law. This approach is arguably untenable, however. Freezing a customary law system at a point of time only distorts the meaning of a living adaptive system such as customary law.

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15 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58; 214 CLR 422; 194 ALR 538; 77 ALJR 356 (12 December 2002)
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2002/58.html?query=^yorta%20yorta

Culler's17 use of the image of an arrow to explain the deconstruction of the unified identity – as the unified and original body of customary law - is illuminating in this context. He writes that the arrow cannot be perceived to be in motion when present instants are perceived in isolation. We can only understand the arrow to be in motion if every present instant carries traces of past and future instants. "It turns out that the present instant can serve as ground only insofar as it is not a pure and autonomous given. If motion is to be present, presence must already be marked by a difference and deferral".18 The present, therefore, is an effect of difference – the difference from the past and the future. Now, if customary law is understood as a system being fully identical to itself, the identity must be fully present to itself. If not, it cannot be essential in the philosophical sense, since it would not be a complete unity. But if the present is an effect of difference, then that identity itself cannot rely on presence to give it its unity. In the same way that we must differentiate in order to understand the present instant of the arrow as an instant of motion, we need to differentiate in order for an identity to be. The identity only has identity once it has been differentiated from what it is not – there is no unity of presence that can provide such identity.

This paper investigates whether a complexity approach could help us to deal meaningfully with customary law without having to resort to a snapshot of the system in order to describe it. This is the case because complex systems are able to accommodate both structure and change within itself – which means that change does not necessarily corrupt the system.

4. The Communal Land Rights Act

The Court in *Yorta Yorta* understood state law, and in that case the *Native Title Act*, as the expression of the intersection between common and customary law. Thus, the statute articulates this point of intersection.

I now turn to a brief outline of the most important aspects of the *Communal Land Rights Act*, the South Africa legislator's attempt to regulate customary ownership, and the arguments raised to challenge its constitutionality.

The Bill of Rights in the South African constitution requires that new statute law must provide for security of tenure. The Communal Land Rights Act 11 of 2004 ("CLARA") was passed by the South African parliament in 2004. It has not yet been brought into operation by Presidential proclamation. CLARA is the legislation which is intended to meet parliament's obligation to enact legislation to provide legally secure tenure or comparable redress. The purpose of the Act is "to provide for legal security of tenure by transferring communal land … to communities".19

16 Culler, Jonathan. 1983. *On Deconstruction: Theory and Criticism after Structuralism*. London: Routledge. 94

17 N 16 above 95.

18 Communal Land Rights Act, [No. 11 of 2004], G 26590, 20 April 2004 http://www.info.gov.za/view/DownloadFileAction?id=67949

In these communities, rights are controlled and exercised at different levels of social organisation. The rights are layered within one another, and extend upwards from the individual through the household, the family group, the neighbourhood, the village, and the ward, to the wider community or 'tribe', depending on the resources in question. Different land uses attract varying degrees of control at different levels of socio-political organisation. For example, allocations of arable land are often controlled at the level of the family and the neighbourhood, while grazing and woodland use is the concern of a wider segment of society.

Land rights thus have a shared nature and are acquired mostly through membership of social groups. The rights are not absolute; their content is dependent on other rights which co-exist within this layered system. Professor Nhlapo20 describes the system as follows:

> *One of the key features [of living customary law] is that land relations are created by and mirror the bonds and relations between people. Another is that access to land is a function of membership at different levels of rural society, for example, membership of the family, lineage, village or wider community.... This system of nested rights is reflected in the different levels at which decisions pertaining to land are taken, for example family meetings, clan meetings, village council meetings and tribal council meetings... Colonial constructs, however, reconceptualised these levels as points of delegated authority flowing downwards from a sovereign power, and so undermined the strength and relative independence of systems of land rights at the different levels.*

This feature of the customary law system – that rights are a function of one's relationships to others in the group – points to the functioning of the system as a complex system.

4.1 The key elements of CLARA

There were three fundamental and far-reaching measures in CLARA.21

- First is the vesting of the ownership of communal land in "the community" through the institutions and on the terms created by CLARA.

- Secondly, certain existing rights in the land, which are referred to as "old order rights", will be confirmed or converted into "new order rights". The content of new order rights will be determined by the Minister of Land Affairs. New order land rights are to be secondary rights of occupation and use, which are subordinate to the "community" ownership of the land. Transaction practices must be codified into written "community rules". New order land rights can be upgraded into freehold ownership. This spells the end, and legal extinguishment, of customary tenure law.

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19 Nhlapo vol 6 p 543 para 20; 23 *Tongoane and others v The National Minister for Agriculture and Land Affairs and others*, 11678/2006 (NGHC October 30, 2009) Prof Nhlapo is a Deputy Vice-Chancellor and Professor of Law at the University of Cape Town. He specialises in the field of customary law and he gave evidence as an expert on behalf of the applicants.

20 Claassens, A., & Cousins, B. (2008). Land, power and Custom. Cape Town: Juta.

• Thirdly, CLARA provides for a land administration committee which is to represent a community which owns communal land. Its powers include allocating land rights and maintaining records of rights and transactions. Where a traditional council [formerly a tribal authority under apartheid state law] exists, the council will act as land administration committee.

5. The theory of complexity and relevant principles

If a system is defined as 'a set of objects together with relationships between the objects and between their attributes',22 then a complex system is one where the elements or objects themselves have no meaning separate from the system, but rather the meaning/representation of the system is a function of the dynamic interactions between the elements. In complexity terms it is said that meaning emerges from the differences and interaction between elements. It follows that an element has no meaning outside the system, but only has meaning in relation to the other elements in the system.

Because the system is defined by the interactions of its elements and in a complex system these interactions are non-linear and dynamic, the meaning of the system cannot be captured in or reduced to a set of rules. The definition of a complex system must always be provisional.23

Systems theory therefore investigates phenomena as a unity of organised elements. The purpose of systems theory has further been described as a means of 'dealing with complexity'.24 It is thus hardly surprising that the theory of complexity eventually developed from systems theory.

The problem of dealing with complexity came to a head in cybernetics when the race for creating artificial intelligence started in earnest in the sixties. In order to be able to create a computer with intelligence similar to the human brain, scientists attempted to model the brain as a system of rules which could be replicated to create artificial intelligence. This turned out to be impossible, however, because the brain does not function according to linear rules. The interactions between neurons in the brain are non-linear; the functioning is complex. More important, however, these interactions are what constitute the 'meaning' generated by the brain, not the neurons or elements in isolation. An element has no meaning outside the system. To this day, artificial intelligence remains science fiction, but scientists did become wiser: they know now that some systems are simply too complex and dynamic to contain within a rule-based model.25

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21 AD Hall and RE Fagan 'Definition of System' in *System Thinking Vol 1* (2003) 63.

22 See Cilliers, Paul 1998 *Complexity and postmodernism: understanding complex systems* London: Routledge.

23 Von Bertalanffy, Ludwig. 2003.'General System Theory'. in *System Thinking Volume 1*. London: Sage Publications. P 38.

24 N 22 above.

The generation of meaning in a distributed way points to the first of two central features of complex systems. Representation is the way in which the system generates meaning from the information obtained by it.26 Cilliers suggests that we should understand representation in complex systems as distributed (as opposed to the traditional theory of representation which assumes a one-on-one correspondence between, for example, a linguistic sign and that to which it refers). Distributed representation means that the elements of a system does not have meaning because they correspond to something outside the system, but rather acquire meaning from their relationship with other elements in the system – as in Saussure's theory of language. This is the only theory of representation that can accommodate meaning in a complex system.27

Importantly, however, the fact that meaning is generated within the system does not mean that there is no relationship between the inside and the outside of the system. Meaning is a "process", he argues, which involves not only inside and outside elements, but also the history of the system.28

Because meaning is distributed, the ability of the system to represent depends in part on how the system can interact with its environment. It is never possible to fully analyse these interactions and therefore to understand the system completely. In fact, the best one can do is to take "snapshots" of the system, acknowledging that our efforts to capture the essence of the system cannot be anything more than subjective and momentary interpretations. Because the system is always changing, and because of the non-linearity of the interactions between elements, we can never give a snapshot of the system the status of a 'final' or 'essential' interpretation.29

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. An example of a system that is able to self-organise is language30. Language, as all complex systems, must have structure in order to be used as a means of communication. At the same time, language must be able to adapt to the changing circumstances of its users in order to remain functional. But change cannot be the choice of an individual or the instruction of a centre of power; it must be the result of the interaction between many individuals using the same language. Self-organisation is what allows complexity to be able to accommodate the tension between structure and internal change.

An understanding of the capacity of complex systems to self-organise is not sufficient to identifying complex systems in general, however. To this end, Paul Cilliers31 has further developed a list of characteristics which assists us in identifying complex systems:

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26 N 22 above, p 58

27 N 22 above, p 11.

28 As above.

29 N 22 above, p 80-81.

30 Cilliers, Paul (n 22 above) p91.

26 As above.

1. They have a large number of elements.
2. These elements must interact dynamically resulting in the system changing over time. Merely having a large number of elements, does not make a system complex.
3. The interactions in a complex system are rich – elements do not merely interact with a few fixed elements.
4. The interactions are non-linear.
5. Interaction happens over a short range (that is, information is received from a closely related element), but any interaction may have wide-ranging influence.
6. Interaction occurs in a loop – either positive or negative – which means that the activity of an element may directly or indirectly affect the element itself.
7. Complex systems are open to interaction with the environment.
8. Complex systems must always have a flow of information running through them; they cannot be at a state of equilibrium.
9. Complex systems have a history which informs it.
10. Elements of the system are not aware of the behaviour of the system as a whole – the latter is a function of the changing nature of the system's structure.

If these characteristics are applied to an understanding of living customary law, the significant similarity with a description of a complex system becomes evident. I shall only highlight some of the most important ones here:

1. The living customary law system consists of all the people who engage with each other in terms of customary law. It is not a system of law separate from the social, as the positivist Western understanding of law, but one that is embedded in the lives of the people living it. Therefore it clearly consists of a large number of elements.

2. We have seen that it is common cause that the customary law system changes over time. This was acknowledged by the Court in the *Richtersveld* case, where the Court described customary law as 'in a constant state of development and adaptation to changing circumstances and needs'.

3. The late Prof. Okoth-Ogendo32 wrote on the 'persistence of indigenous law' even despite the interference of state law.

> *Now, more than four decades after independence, it has become clear that the lifestyles of most African people, especially those living and drawing their livelihoods from rural areas, continue to be determined by values and norms indigenous to their culture and history, and despite the extensive reach of state law, these remain resilient and robust.*

The customary law system was thus able to adapt to the major changing circumstances of colonisation and subsequent independence as well as to more minor environmental changes. It has the ability, in complexity terms, to *self-organise*.

4. The customary law system's representation of itself is distributed: interaction happens over short ranges at local community levels and meaning is created there where rules are negotiated. The system does not have a central locus of meaning or a system of rules that

27 In Cousins and Claassen (n 20 above) 99.

dictate the meaning – it emerges at all levels as interaction occurs. Any attempt, therefore, to define customary law in terms of a set of rules will necessarily be a reduction – because meaning is produced locally and over time.

5. There are feed-back loops in the system: an interaction in one village may result in the constitution of a new expression of custom which may over time be distributed across the system (ie neighbouring communities), be distorted and eventually relayed back to the community.

6. The description of the customary law system as embedded in the social, the political and economics. It is therefore clearly difficult to define the border of this system.

6. The impact of the CLARA on security of tenure and customary law

So how did the CLARA deal with this complexity of the customary law system?

The new system created by the CLARA, removed the checks and balances in the layered customary law system. All power is now centrally located, while those at "lower" levels have no decision-making power. One of the elements of security of tenure is the ability to make decisions with regard to land allocation and use. Where that ability is removed from those who occupy the land, their tenure security is reduced. This centralisation of the power of administration and allocation, placed in the hands of a larger community, undermines the protection and tenure security which exist under the living customary law. Prof Nhlapo33 describes the role conferred on traditional leaders by CLARA thus:

> *That role is consistent with the Western constructs of absolute ownership at statutorily determined levels of the hierarchy, along with a top-down model in which traditional leaders are given unprecedented control over communal land. Such a role does not accord with customary law.*

CLARA thus commits the fundamental error against which Ngcobo J (as he then was) warned in *Bhe*. CLARA further fails to address customary land law, and the rights which it creates "on its own terms and 'not through the prism of the common law'".34 It simply ignores the web of mutually reinforcing rights and obligations which are the foundation of indigenous land law, and the security which it provides.

Furthermore, the entire customary law-based system of land administration in the areas to which CLARA applies is to be replaced by a system of community rules. It is an inherent quality of customary law that it is not codified in written rules and remains flexible and developmental as circumstances change.

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28 Nhlapo vol 6 pp 552 – 553 *Tongoane and others v The National Minister for Agriculture and Land Affairs and others*, 11678/2006 (NGHC October 30, 2009)

29 Judgment of Ngcobo J in *Bhe* at [156].

In this regard, Prof. Nhlapo35 says the following: "It is notoriously difficult to reduce fluid and responsive systems of living law to a set of written rules. It can be argued that doing so will tend to undermine the flexibility of the 'living processes' which enable customary law constantly to adapt and develop." As a result, even an attempt to replicate the customary law of a particular community by writing it into the rules made under CLARA will still have a substantial impact on the customary law of that community.

In complexity terms, the impact of CLARA on customary law systems as complex systems may be summarised thus:

- As was argued, the definition of a dynamic system will always be provisional; therefore the codification of customary law that CLARA represents is a reduction and distortion of the system – and ensures that the meaning that will continue to emerge from the system will not be a part of the representation of the system. The disparity between official customary law and living customary law will soon become untenable.
- This attempt to fix the meaning of the system is only exaggerated by CLARA fixing the meaning of the notion 'community' – thereby not only fixing the boundaries of the system, but also denying the right of negotiation of sub-communities.
- In order for a system to have the ability to self-organise and adapt to changing circumstances, it must continue to allow for meaning to emerge from the system as it engages internally and with its environment. This is only possible if the system does not have a centre of control that dictates the meaning of the system. CLARA creates exactly such a centre of control by centralising power.
- CLRA denies the fact that within the complex customary law system people's rights exist because of and are defined in terms of their relations to others in the system. The rights do not exist separate from the system. CLRA fixes some of these rights by redefining them in terms of western notions of individual ownership rights – thereby distorting and even destroying them.

7. Allowing for the complexity of customary law

If a system is not allowed to operate as a complex system, for example if the interactions between its elements are ignored in the representation of the system, the system collapses as a dynamic, adaptive organ. In other words, if state law defines finally what customary law is and what the rules governing local interaction are, then the representation of the system is fixed. The local interaction between elements will continue (as has become evident in fieldwork), but the meaning that emerges from these interactions do not influence the representation of the system. Instead of distributive representation, the system's meaning is fixed. This is where the great disparity between state law and customary law is born.

What we argue for, is that state law regulates customary law in such a way that it may continue to create its own meaning. Two obvious fears do arise, but we believe they can be alleviated if the system is allowed to operate as a complex one. These issues certainly need further investigation, but we shall make some preliminary comments here.

30 Nhlapo vol 24 p2391 - 2392 para 10. See also Pienaar vol 25 p2492 para 41.1 – p2493 para 42.2. (*Tongoane and others v The National Minister for Agriculture and Land Affairs and Others,* 2010)

1. The problem of legal certainty

Legal certainty based on the principle of justice that dictates that a system of rules that people must adhere to, cannot be arbitrary. In customary law, the rules are negotiated and fluid, therefore the relationship with the rules are different – it is not a system separate to their lives, but a system constituted as a result of the dynamics of their lives and interactions, while the consequence of breaking the law is not the formal justice of a court room. The principle of legal certainty as it is understood in the Western law canon can therefore not be applied *mutatis mutandis* to customary law.

Having said that, the ability of the customary law system to self-organise means that, despite the fact that the system is not rule-based and dictated by a centre of control, it is not chaotic or arbitrary. There is structure and there are boundaries – these are simply a function of the system rather than an imposition by an external super legislator. Furthermore, the feedback loops created by non-linear interaction constrains change to the degree that the system does not become chaotic.

2. Unconstitutional customary practices

To say that state law must allow customary law to develop and 'live' as a complex system continuously creating its own meaning is not to say that the system should not be expected to pass constitutional muster.

It should further not be assumed that customary law puts its subjects necessarily at a disadvantage in terms of their fundamental rights. With regards to gender equality, CLARA converts old order rights into new order rights, and entrenches them. But the vulnerable rights of women, which are not old order rights, are not protected by CLARA – to the contrary, they are treated as non-existent. By entrenching certain (mainly male but including spouses) rights, and ignoring other (mainly female such as single women and widows) rights, CLARA entrenches and strengthens existing insecurity and inequality.

Customary law was able to cater better for the needs of women because it allowed women to negotiate their position within their communities.

Finally, the struggle of the four communities for rights and justice is not over. If the CLARA is declared unconstitutional by the Constitutional Court, then the Act must be rewritten. Next month the South African parliament will debate the Traditional Courts Bill ('TCB'). This Bill, if it is enacted, will turn traditional leaders who are also chiefs, into magistrates with extra ordinary new powers... and ignore the role of village and headmen's courts. Like the CLARA, the TCB will straightjacket the development of customary law, its institutions and their rich local interactions.

3. The problem of power

The problem of power relations that will necessarily impact on these negotiations is acknowledged and it is not assumed that women will always easily be able to assert their rights; however, the possibility of doing so remains a better alternative than CLARA's codification that denies women these rights into perpetuity.

Two comments are to be made in this regard. The fact that meaning within a complex system is understood as a process and that this meaning can never be described exhaustively as it is always transforming, opens possibilities for new, 'better' meaning to be created. The fact that we cannot conceptualise our form of life, the fact that meaning cannot be demarcated, means that we have endless possibilities of re-imagining this form of life. In terms of feminism, for instance, the impossibility of limiting the meaning of the semantic system that is used to describe women means that women have the opportunity to negotiate new meanings in terms of which to understand themselves. If the system is codified, the opportunity for women to negotiate new meanings for themselves within the system, is negated.

Secondly, the fact that meaning is distributed within a complex system implies that that meaning cannot be controlled or manipulated by a single actor in the system. The interactions of all the elements allow meaning to emerge, rather than meaning being the product of a single designer either within or external to the system. This means that, if a complex system is allowed to operate properly, power should be constrained by this distributed nature of meaning. No one will have the power to decide the meaning of, for example the role of women, within the system; rather, the meaning of that role will emerge from all the interactions distributed across the system. This does not necessarily mean that a more powerful role for women will emerge, but it does mean that whatever their role is, it cannot be determined solely by the group in power within the system – for example, the senior men as their power is constrained by the distributed representation of meaning.

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