The changing face of customary law in South Africa: a dualistic examination of the viability of the *Van Breda*-test and a call for revised criteria for customary law to have an existence right in the 21st century

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Abstract

Customary Law has been at the forefront of Constitutional Court applications and verdicts for the last decade. Custom and traditions are increasingly criticized for not conforming to the social morals of our society and an increasing number of communities are faced with law suites regarding the unconstitutionality of the practicing of entrenched customs and traditions. The 1921 Van Breda*-test for a custom to be recognized as having legal and social applicability has been called into question by various South African Courts. These requirements have been identified as being too rigid, incapable of change negating the customs and society it wishes to conform or represent. In* Shilubana and others v Nwamitwa (2009) *the court held that legislation had to be formulated to substitute the current inadequate requirements for the validity of a custom. These requirements must reflect the changing face of custom and grant this norm- structure its rightful place in jurisprudence.*

Key words:
Customary Law; Indigenous law; Constitutional court; Traditions; *Van Breda*-test.

Opsomming

Gewoontereg is die afgelope dekade aan die voorpunt van Grondwetlike hofaansoeke en -uitsprake. Gewoontes en tradisies word al hoe meer gekritiseer weens die nie-voldoening aan sosiale morele standaarde van ons samelewing. Al hoe meer gemeenskappe word onderwerp aan regsaksies weens die ongrondwetlike aspek van die beoefening van verskanste gewoontes en tradisies. Die 1921 Van Breda-*toets, wat die gronslag gelê het vir die regserkenning van 'n gewoonte, word al hoe meer deur Suid-Afrikaanse howe in twyfel getrek. Hierdie vereistes word nou geïdentifiseer as te rigied en nie in staat om te verander nie, terwyl dit die gewoonte en gemeenskap wat dit moet verteenwoordig verloën. In* Shilubana and others v Nwamitwa (2009*) het die hof bevind dat nuwe wetgewing geformuleer moet word om die huidige onvoldoende situasie rakende die vereistes vir die regsgeldigheid van 'n gewoonte te ondervang. Hierdie vereistes moet die veranderingsgedaante van gewoonte weerspieël ten einde die norm struktuur sy regmatige plek in die regswetenskap te verleen.*

Sleutelwoorde:
Gewoontereg; Inheemsereg; Konstitutionelehof; Tradisies; *Van Breda*-toets.

1. The normative structure of law in South Africa: the historically awkward position of customary law

Our normative system in South Africa makes a distinction between law as recognized by state, ethics (individual morality) and community mores (positive morality). The first having the capacity to be enforced by state and the latter two reflecting on the inner beliefs, morals and ethical conduct of an individual or a community within a certain social structure and at a specific period in time. Law recognized by state is applicable on all nationals and foreigners within our borders, while ethics and community mores is only applicable to the individual or communities that voluntarily submit them to it. In contrast with law recognized by state the ethical laws need not adhere to rules of the state (Govindjee, Holness & Shirk, 2006:3). A good example of this is the belief in the death penalty by certain individuals or communities. While the South African legal structure does not

allow the death penalty, believing in it is not a crime. Similarly traditional indigenous African (including non African) customs often fall outside the parameters of being legally recognized by state due to their content, but are still applied by tribes and communities irrespective of its legality under the bearing of traditional ethical morality. A tradition or custom itself is not *per se* against the law of state, but when the practical exercise of that custom is against the constitution of our country and is challenged in a court of law, a predicament enfolds. The exercise of the "unlawful" aspect of a custom is fundamental to the future existence of a custom within a traditional community. It is thus this problematic situation that needs attention from our legislature as past requirements have now reached the point where they have become inappropriate to the arena they wish to address. Similarly, indigenous law has encountered the same predicament, whereby courts are allowed to take judicial notice of customs and traditions of a community, just to have it struck down by court as being unconstitutional. These issues are influenced by the Constitution, as human rights weigh heavy in favour of the disadvantaged party in the practical implementation of customs in traditional societies. In recent verdicts the Constitutional Court has called for the legislature to make a ruling to end the current uncertain position of customary law in our legal structure.

2. Customary law: in need of a quantum leap into the 21st century

New criteria must be developed by which custom can be tested. The requirements for a custom to be valid as set down in *Van Breda and Others v Jacobs and Others 1921 AD 330* can no longer accommodate the challenges set by different customs in court cases in the 21st century. A new, flexible criteria must be formulated, to prevent certain customs from becoming obsolete in their entirety, causing it to become either illegal or facing the danger of being lost to future generations. The argument will be made that current customary law has become too rigid and gained an "official" status. This is much different from the accurate *status quo*: that customary law must be seen as a "living" element of tradition, which has the ability to change and transform along with the society it dictates. A uniform test needs to be established by which both custom (living customary law) and indigenous law's applicability and constitutionality can be tested. The question is also posed: if a custom changes is it still perceived as a custom and will future generations still adhere to the longstanding traditions of their ancestors due to the influence the constitution has on these customs?

In the last decade a number of court cases have been heard regarding the legality of certain customs, either in their entirety, or partially. The Constitutional Court has played a major role in contributing to the recognition of customary law as having a rightful place alongside common law in South Africa. Equally, the Constitutional Court has not hesitated in striking down certain customs due to their unconstitutionality. In concurrence with the latest constitutional case, the final argument will be made that Parliament, as the legislative authority of South Africa, will have to enact relevant law to encompass customary law and give it the recognition it deserves as envisioned in sec 30 and 31 of the Constitution.

3. Defining "Customary law"

Customary law can be defined as the generally unwritten laws of a country, usually practiced within a specific societal structure. It is fixed practices in accordance with which people live because they regard it as law. Customary law is based on widespread acceptance within a specific culture of a traditional practice that has existed for a long period of time (African Charter on Human and Peoples Rights). In South Africa customary law is usually associated with African, Islamic or Muslim culture. This is, however, not a restricted list. All cultures have customs, which if recognised by law, receive legal enforceability.

In our South African Law, customary law divides into two aspects, namely Indigenous law and Custom. Both these aspects form part of our elaborate sources of law. It is necessary to distinguish between the two for the purpose of this article, as the *Van Breda*-test was traditionally only intended for customary law of communities in South Africa which are not African.

(i) Indigenous law (also known as the living customary law of African communities) as source of law:

Indigenous law or living customary law is the unwritten customary law (customs and traditions) of African communities. The *Law of Evidence Amendment Act* 45 of 1988 stipulates that a court can take judicial notice of indigenous law/African customs, provided that it is not in conflict with the principles of public policy or the rules of natural justice. Judicial notice means that indigenous law does not have to be proved in accordance with the requirements of the *Van Breda*-test. Sec. 39(2) places a duty on courts to develop indigenous law in accordance with the Bill of Rights (*Bhe*-case). Sec. 211(2) of the Constitution gives the right to traditional authorities to

develop their own law in accordance with the Constitution (*Shibulana*-case) (Charter, Chapter 2).

(ii) Custom (living customary law of communities that are not African) as source of law:

Customs/customary law are generally unwritten law. It is set practice by which people exist. The *Van Breda*-case and -test concerned the coloured community of Fishhoek. As *The Law of Evidence Amendment Act*, 45 of 1988, takes judicial notice of indigenous law, customs of the remaining ethnic groups in South Africa have to be proved in accordance with the *Van Breda*-test before it can qualify as law. The *Van Breda*-test does not have to be applied in the case of African communities but has to be applied when customs of other communities, have to be proved.

4. Customary law formulated from a Christian ethic perspective

William Barclay said, "If you want to put it in one sentence, ethics is the science of behaviour. Ethics is the bit of religion that tells us how we ought to behave."

The term 'ethics' comes from the Greek word '*ethos'* meaning norm or custom, which can be comparable to moral values. It implies a customary way of doing something, which can differ from the historical or anthropological way of acting. "Ethics therefore deals with judgment as to the rightness or wrongness, virtuous or vicious, desirability or undesirability, approval or disapproval of our actions" (Grace, 2009:1). A culture has its own value systems which it uses to judge if actions or omissions are either right or wrong. One culture might not agree with another culture's exercising of certain customs or beliefs, due to the inner conflict caused by different ethical views. Language, traditions, culture and religion all have an iconic impact on the beliefs and ethical values of society. No person can therefore be truly ethically neutral. The perspective a person has concerning another's ethical stance is determined by many factors, one such factor is religion. Religion can influence a person's point of view. Take for example the diverse viewpoints regarding abortion, euthanasia and blood transfusion that are held by different religious groups. The 2001 census taken of South Africa state that Christians account for 79.7% of our population. Accordingly Christian ethics should have an overhand concerning the norms in exercising of customary law, but in a secular society Christian beliefs and norms exist alongside other customs and traditions. To understand the customs and traditions of other cultures a value based

system must be used to identify the right or wrong element of the tradition that is being exercised. The value system used in this article is Christianity. The set of ethics used by Christians is based on the principles derived from the Christian faith. The Christian ethical basis is formulated from the following summarised fourfold ideas (Pawsey, 2002:1):

(a) Relationship towards others with Christ-like standards and the exercising of respect for all human life.
` (b) Freedom to exercise the Christian religion and to be obedient to Christian norms.
(c) Love or "*agape*" which empowers us not to commit murder, not to steel, not to covet nor to lie.
(d) Responsibility to care for and help others.

In the 21st century it is common practice for an indigenous person to be called a Christian, but also to exercise customs and beliefs that are not in line with the core values and ethics of Christianity. Customary Law will have to undergo a radical change for it to be regarded as remotely having Christian ethics or norms, but the change to the criteria of customary law as envisaged in this article will bring it a step closer to being acceptable according to Christian standards. Christian beliefs and norms and customary law are worlds apart, but bringing the enactment of the customary law in line with the Constitution gives it a sense of humanity which it lacked for far too long. The rigid approach in the *Van Breda*-case needs to be substituted with a more forgiving Christian based approach; one that echoes the ethical values of a religion that is love driven, compassionate and humane.

5. The establishment of customary law in South Africa

For many centuries and even during the colonial era, customary law and common law existed together in a legal pluralism environment, whereby the traditions, cultural practices and rituals of social structures, usually unwritten laws, within the country's boundaries were upheld and acknowledged alongside the formal documented law of parliament (Bekker, Labuschagne & Voster, 2002:7). In 1921 the Appeal Court of South Africa made a ground breaking ruling in the case *Van Breda and Others v Jacobs and Others 1921 AD 330*. This court case entrenched the existence of customary law as a source of law in South Africa. Accordingly, the following four criteria must be adhered to for a custom of a non-African origin to enjoy legal recognition, namely (Fouche, 2007:10):

(1) the custom must be reasonable;
(2) the custom must have existed for a long period of time;
(3) the custom must be generally recognized and observed by the community; and
(4) the contents of the customary rule must not contradict any existing rule of law.

Hence an applicant that was successful in proving this fourfold criterion proved that a custom existed. The court then has the ability to recognise the custom and in so doing the custom receives the same status as a rule of law, with the power to be enforced against fellow citizens. The pressing question now is: have these requirements outlived their applicability? In light of the first criteria and with regard to our Constitution, most customs are in danger of non-recognition due to the reasonableness which must now be compliant with the Constitution.

Indigenous law, on the other hand, does not need to be proven and mere judicial notice by a court can give it legal status. The dilemma that exists is that a court can immediately find such a custom or tradition to be against the Constitution and hence strike it down. This is an unsatisfactory position that needs to be addressed by legislation.

6. The *Van Breda*-case dilemma

The *Van Breda*-case was originally used to entrench custom as a source of law, alongside indigenous law, common law, judicial precedent and legislation in the South African law structure. The *Van Breda*-test tested the existence of long standing customs that were entrenched in social structures. The assumption was thus made that these customs could, or would never change. In the *Shilubana*-case (2009 at para 35) the National Movement of Rural Woman (as *amicus curiae*) noted that "… customary law is a flexible, living system of law, which develops over time to meet the changing needs of the community". It is thus fair to conclude that if a custom has the ability to develop according to the requirements of a social nucleus, a rigid test as the *Van Breda*-test can no longer be used to establish the legal applicability of a custom. Section 211(3) of the South African Constitution enjoins courts to "… apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". A custom must consequently be allowed to develop. Development implies that some amendments of past practices must be allowed and implemented. Constitutional values and the true meaning of the custom at stake must ultimately merge, resulting in a

constitutionally accepted practice that has amalgamated with traditional custom.

In the well known *Richtersveld Community and Others v Alexkor Ltd and Another 2003 (6) SA 104 (SCA)* case the court noted that in deciding the existence of a custom, the *Van Breda*-test "… might not be appropriate to indigenous customary law …" but the court did not decide what other test would be appropriate. In the most recent 2009 documented Constitutional Court case of *Shilubana and others v Nwamitwa 2009 (2) SA 66 (CC)* this point was decided by court. This case can serve as a basis for the development of new criteria whereby a living customary rule can be decided by.

7. The Constitution of South Africa and customary law

Section 211 of the *Constitution of the Republic of South Africa*, 108/1996 entrenches custom law in South Africa:

"211. Recognition.-(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law" (Constitution, 1996:1331).

In the light of section 211, customary law can no longer be seen as an auxiliary form of law used to interpret special cases. It must be regarded as a law in its own right that demands respect. In the *Richtersveld Community*-case *(*2003 at para 51*)* the court rightly held that customary law must be acknowledged as "… an integral part of our law … an independent source of norms within the legal system". It can therefore be argued that the influential nature of customary law has changed since the *Van Breda*-test was developed. Customary law was then seen as an abstract form of law belonging to traditional cultures, but now it is seen as existing alongside formal law, reflecting the society it serves, integrated in and recognized by our Constitution.

8. Living customary law vs official customary law

To understand the need for a new test whereby a custom can receive legal recognition, the difference between "living" and "official" custom law must

be explained as a point in case. Traditional legal views regarding customary law, regarded it as an element of tradition that was securely rooted in the past and having the ability to adhere to the fourfold criterion of the *Van Breda*-case.

This view catagorised customary law as being rigid; incapable of change and set in the past. This became known as the "official" customary law. "Living" customary law is seen as having the ability to be changed by the community it affects, developing alongside new trends of the community and conforming to the changing demands of society influenced by the sovereignty of the Constitution. It is argued that because customary law, like its legal counterpart legislation, is changed to conform to the needs of the community in which it exists, it is impossible to believe that the *Van Breda*-test, with its roots entrenched in the past criteria, can still be the test applied to proof that a custom exists. Long gone are the days when customary law and tradition had to prove their rightful place in our legal culture, current views embrace these norms as being unreservedly part of our pluralistic norm-structure.

9. Case law: ushering in change

Bhe and Others v the Magistrate, Khayelitsha and Others 2005 (1) BCLR 1(CC)

In this case an application was made on behalf of the two minor children of Mrs Bhe and her deceased partner. It was contended that the impugned customary rule of male primogeniture discriminated unfairly against the two minor children who were prevented from inheriting intestate from their deceased father. The applicant and deceased were married according to customary law and accordingly customary law ruled the devolution of the deceased estate. According to customary law women are not allowed to inherit from a male predecessor. Section 23 of the *Black Administration Act* set out the rule of male primogeniture, and was struck down by Langa DCJ as an example of "official" application of entrenched living customary law which did not develop or change according to the demands of society. Consequently, the court struck down section 23 of the *Black Administration Act* and ordered that the equality provision of the Constitution supplement the void that was left. Langa DCJ further held that it was the court's responsibility to bring customary law in line with the provisions of the Constitution. The court, however, remained mute on the question of the out dated requirements of the *Van Breda*-test. In this case it became evident that customary law had to be regarded as living law and that legislation

was needed to regulate customary law and its applicability where its constitutionality was called into question.

Shilubana and others v Nwamitwa 2009 (2) SA 66 (CC)

The case at hand was about the right of the appellant to succeed her father as Hosi (Chief) of the Valoyi traditional community in Limpopo. In 1968 the appellant's (defendant in High Court Case) father died without a male heir. At the time customary law did not make provision for a woman to become Hosi. Consequently, Me Shilubana did not succeed him, although she was the eldest. He had no male heirs and therefore his brother Richard Nwamitwa was appointed Hosi of the community. Between 1996 and 1997 the Valoyi community passed resolution that in light of the new Constitution, Shilubana was permitted to succeed Hosi Richard. After Hosi Richard's death his eldest son the defendant (appellant in High Court case), interdicted the appellant on ground that the Valoyi community had no power to change customary law. The Constitutional court gave a ground breaking unanimous verdict at the hand of Van der Westhuizen J, stating that a traditional community must have the ability to change and develop customary law against the value of legal certainty and vested rights. The court also held that the *Van Breda*-test was outdated and echoed the need for the development of legislation to intercept this void in our current legal paradigm.

10. Lobbing for a new test for customary law

It has thus become evident from the above information that a new test is necessary that could serve both custom and indigenous law. Currently only customary law of communities that are not African must submit their customs to the rigid requirements of the *Van Breda*-test. Indigenous law is currently also in a state of confusion regarding the applicability of outdated customs and traditions as seen in the *Bhe*-case. A uniform test needs to be developed whereby both living customary law and indigenous law can be tested.

The question thus is: what elements must be addressed in such a test and who will have a say in the final formulation of such a test. A difficult question with an easy answer: the community that wishes to recognize the custom must be certain of its contents, and must have the ability to shape the custom, aligning it with the constitution, but without negating the intrinsic value of the custom or tradition. The community itself knows the custom/tradition best. It is suggested that this new criteria should permit to development, allowing customs and traditions to develop alongside the needs of the changing society. In the *Van Breda*-test the custom needed to

be consistently applied in the past. This aspect of the test would now imply that any change to a custom would nullify this requirement, leaving the custom invalid due to non adherence of the fourfold criteria. The legal effect would then be that courts would be enforcing customary laws on societies that were no longer following these rigid traditions, alternatively courts would stifle new rules adopted by communities in light of changing social values and needs. In essence, this would be a contravention of the result envisioned by our Constitution. Traditions and customs are seen as living law and ultimately must be granted the ability to be alive and experience change.

11. A new test for customary law

The saying goes: out with the old, in with the new. Lobbying for change is never complete without a feasible alternative. In line with the unanimous verdict of Van der Westhuizen J in the *Shilubana*-case several criteria are suggested by which a custom or tradition can be tested. Unlike the rigid *Van Breda*-test, each case will be decided on its own merits and the relevant court deciding the case must involve the community at stake as well as the local traditional authority and as far as its relevant, The Congress of Traditional Leaders of South Africa.

The following is thus suggested as being the new fourfold criterion:

(1) *A consideration of the tradition under scrutiny within the community concerned.*
Comment: the authority will invariably lodge an inquiry into past practices of this custom/tradition within the community. The inquiry must be sensitive to the societal setting of the custom rather than the common law standard by which legislation is weighed against. Authentic records and evidence must be used as secondary evidence for the existence of this custom/tradition.

(2) *The community that observes the custom/tradition has a right to develop and repeal their own customs/traditions.*
Comment: this right is guaranteed under section 211 (2) of the Constitution. Communities' rights to develop their own laws to meet the needs of a rapidly changing society must be respected with the necessary support to accomplish it.

(3) *Customs/traditions must be seen as norms which regulate individuals and communities.*
Comment: a balance between values, legal certainty, respect for vested rights and the protection of constitutional rights must be the

ultimate goal of the courts. The vulnerability of the parties involved and the implications of change must be considered.

(4) *The court must consider whether customary law must be developed to bring it in line with the constitution.*
Comment: violation of human rights is the ultimate reason why laws are amended. If a custom must be brought in line with the constitution, it will be viewed as a positive development of the custom/tradition.

12. The future of customary law: will change cause neglect?

This question has now seemingly answered itself. Due to the changing norms, beliefs and personal values of individuals, custom/traditions inevitably also adapt to accommodate the community it serves. As such, these customs/traditions are not forgotten. In fact, the very change that takes place allows a younger generation to appreciate and experience the customs/traditions of a community, be it in a new light. The essence of the custom/tradition is still upheld, the unconstitutional aspects are changed to reflect legal certainty. To allow living law to take its natural course, customary law is developed within the parameters of legally accepted practices and standards, affording the future existence of age-old traditions, alongside the legal recognition of equal rights.

13. Conclusion

Benjamin Disreali stated that in a progressive country change is constant; change is inevitable. To allow law, in which form whatsoever, to change according to the needs of a society, is to create legal certainty. The reflection of a society is seen within the mirror that is its customs and traditions. To uphold the view that customs are incapable of change, is an outdated, lamentable view that results in a distorted application of law that is not in line with the changing needs and views of an ever evolving society. To change the requirements of the legal system in regards to custom does not influence the future existence of a custom/tradition. On the contrary, changing a custom's contents to reflect a changing society could be the very lifeline it needs to ensure future existence.

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