STUDY UNIT 1: INTRODUCTION TO LEGAL PLURALISM AND CUSTOMARY LAW

- **Common Law**: A body of law consisting of Roman-Dutch Law dating back to the 17th and 18th century, influenced by English Law and further developed in terms of legislation and case law. (can also include religious laws)
- **Legislation**: eg Constitution - published in the government gazette as it is then the law, can be accessed by the public
- **Case Law**: (provides authority) - a traditional pronouncement/confirmation of what the law is, what it should be and what it entails.
- **Customary Law**: (can also include religious laws) the law that is specific to the **indigenous**/the customs and usages traditionally observed amongst the **indigenous African peoples** of South Africa and which form part of the culture of those peoples. Official customary law is incorporated into legislation and expressed/pronounced upon in judgements. The difference between official customary law and living customary law is that the living form is constantly developing and evolving.
- **Custom**: when a certain act or behaviour is observed in a community for a *long period of time (*depending on the custom), that act or behaviour will be recognised as a rule of custom and a source of law.
- **People's law**: unofficial version of Customary Law that originated in rural areas/townships, informal way of dispute resolution that was developed by the people in rural areas due to an opposition to Western court and apartheid systems.

Q: Is living customary law recognised as an official legal system in South Africa?
A: textbook p 13 - certain parts of living customary law are officially recognised, others not

Q: Are there examples where customary law is in conflict with common law?
A: President Zuma's several wives in conflict with common law (civil union act)
A: Muslim laws whereby one husband can have four wives
A: Circumcision in conflict with Section 12 of Children's Act - circumcision of males under 16 years of age is prohibited, yet still performed in certain communities

Q: Are there any **requirements for a custom to be established as a rule of custom**?
A: (a) It must be **evident for a long period of time**, (b) It must be **generally observed by the community**, (c) It must be **reasonable** and (d) It must be **precise/ specific,** (e) it may not be in **conflict with the principles of natural justice** [which means that every party to a matter/dispute must be heard and one cannot be a judge in one's own matter] and in conflict with **public interest**

THERE IS A JUDGEMENT OF AUTHORITY (1921 - VAN BREDA V JACOBS, APPEAL COURT) THAT DETERMINES THE REQUIREMENTS FOR CUSTOM TO BE CONSIDERED A RULE OF CUSTOM

Q: Is custom written down?
A: Only when the court makes a pronouncement of a certain custom as part of customary law

Q: Difference between a rule of custom and living customary law?
A: Customs and usages traditionally observed amongst indigenous people = customary law, whereas custom is not necessarily a RULE OF CUSTOM but merely an act or behaviour observed for a long period of time and can be observed by ANY COMMUNITY or group in South Africa

1. SOUTH AFRICA AS MULTICULTURAL SOCIETY

- Various legal systems, for example:
  - Common law
  - Customary law
  - Religious legal system (Jewish, Muslim, Hindu, etc.)
- System of legal pluralism

2. LEGAL PLURALISM: A THEORETICAL OVERVIEW

2.1 Narrow interpretation:

2.1.1 **State**-law pluralism (weak legal pluralism or official legal pluralism)
- Dual systems theory of legal pluralism:
  - Common law AND
  - Customary law
  - In a single society
  - Where both are officially recognised and exist parallel to each other and sometimes interact in a prescribed manner
- Q: Difference between narrow and broad interpretation?

2.1.2 **Law consists of norms created and sanctioned by official state organs**
- Legal positivism: the law is found in tangible sources (legislation, case law, old authorities, custom) and therefore law cannot be based on moral values - the law is what it is not what it ought to be
- Legal centralism: the state has the authority to authorise and sanction what the law is

2.1.3 **Can law be derived from sources other than state institutions?**
- Relevant/Applicable
- Acceptable
- Accessible
- Not in conflict with Western perceptions of what is moral and in the public interest
- What happens if rule is in conflict with common law?
- The answer is YES, if the requirements are met

2.2 Broad interpretation

2.2.1 **Deep** legal pluralism (strong, unofficial or non-state legal pluralism)

2.2.2 Factual situation which exists in a society
2.2.3 Dominance of state law (specifically Western) is irrelevant because these systems keep existing
2.2.4 Best example: the existence of various religious legal systems

3. HISTORICAL OVERVIEW (self study pp 7-12)

1.3 **Historical emergence of state-law pluralism in South Africa**

- Originated in SA during second British occupation of the Cape
- No record, during this early period (1652-1795), of the recognition of customary laws or the imposition of a European system upon the local population
- No traces of any form of state-law pluralism
- Dutch East India Company (DEIC) main interest in southern Africa: strategic position
- Until end of Batavian rule no question of recognising the laws observed by African language speakers
- Change from British to Dutch rule in 1795 had no impact on justice administration
- Only from second British occupation (1806) that application of customary law was officially regulated
- Mid-19th century: SA divided into 4 autonomous areas: British colonies, traditional kingdoms, two Boer republics
- Customary law only recognised under application of repugnancy clause
- British introduced treaty system in 1833: first formal instrument entrenching state-law pluralism; abolished after 1845
- 1910: customary law recognised to some extent in all areas constituting provinces of the Union of South Africa
- Black Administration Act: first legislative instrument entrenching state-law pluralism

1.4 **Historical emergence of deep legal pluralism in South Africa**

1.4.1 **Unofficial customary law**

- Insufficient evidence of the observance of more than one legal system in a single society/co-existence of heterogeneous communities with different legal system in single society
- Deep legal pluralism originated when the DEIC established a trading post in the Cape
- Disregarded by official state authority, traditional communities continued to observe their customary laws
- Magistrates, chiefs and headmen continued to apply customary law and customary courts continued to operate unofficially
- Late 19th century: application thereof so general that the Native Laws and Customs Commission of 1883 recommended that customary law be recognised
- Cape government gave no effect to this request

1.4.2 **Islamic law**

- Introduced as early as 17th century
- First Muslims came as DEIC soldiers in 1650s
- Prohibited, on penalty of death, from practising Islam in public/propagating