

STUDY UNIT 1

SOUTH AFRICAN LEGAL SYSTEM

AIM OF STUDY UNIT:

After having studied this study unit you should be able to understand the different origins and sources of South African Law, the South African court structure and the doctrine of stare decises.

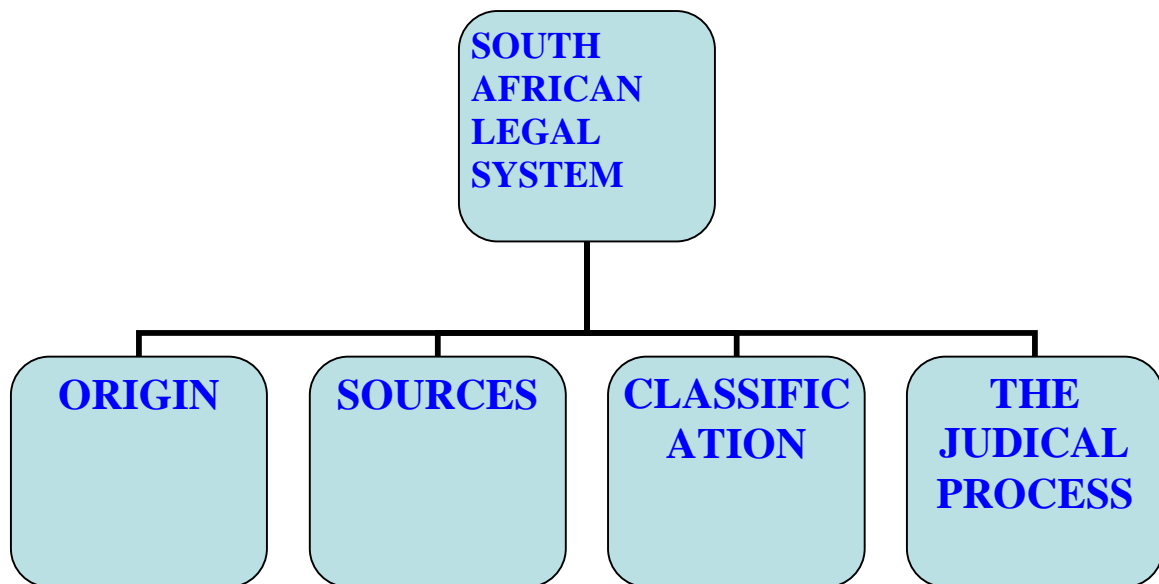
TIP: READ EVERY TEXT UNDER THE DIFFERENT HEADING CAREFULLY WITH A LOT OF ATTENTION AND UNDERSTANDING

INTRODUCTION

Law is a social science it has to provide for the changing community and is bound up to a community it has to serve. To understand law it is essential for us to know the history of law aswell as to have knowledge not only about the community but also about the functions of a community. Knowledge of history of law helps to evaluate problems that may develop in the future.

South African law is not **codified** (recorded in one comprehensive legislation). South African law has many sources but the main source is **Roman Dutch Law**.

FOLLOWING DIAGRAM FORMS BASIS OF NEXT 2 STUDY UNITS (REFER TO PG 2 STUDY GUIDE FOR SAME DIAGRAM VERY IMPORTANT)



A BRIEF HISTORY OF LAW

1.1.1 ROMAN LAW

753 BC to 568 AD basically during this time Rome was a primitive state with agriculture the main source of the economy the nucleus was the head of the family the oldest male ascendant he had the power of life and death of family members and he owned everything. The important legislation was the law of 12 tables this formed the cornerstone for the development of Roman law. Rome grew fast it spread to western Europe and large portions of Asia and Africa during this era it produced many great jurist among whom were Gaius who wrote Institutiones from which most of Roman law is derived. The first 2 centuries after Christ were known as the period of classical law. Roman law was culminated in a codification known as Corpus Iuris Civilis today this work is the primary authoritative source on which South

African courts draw when reverting to solve a problem using Roman law.

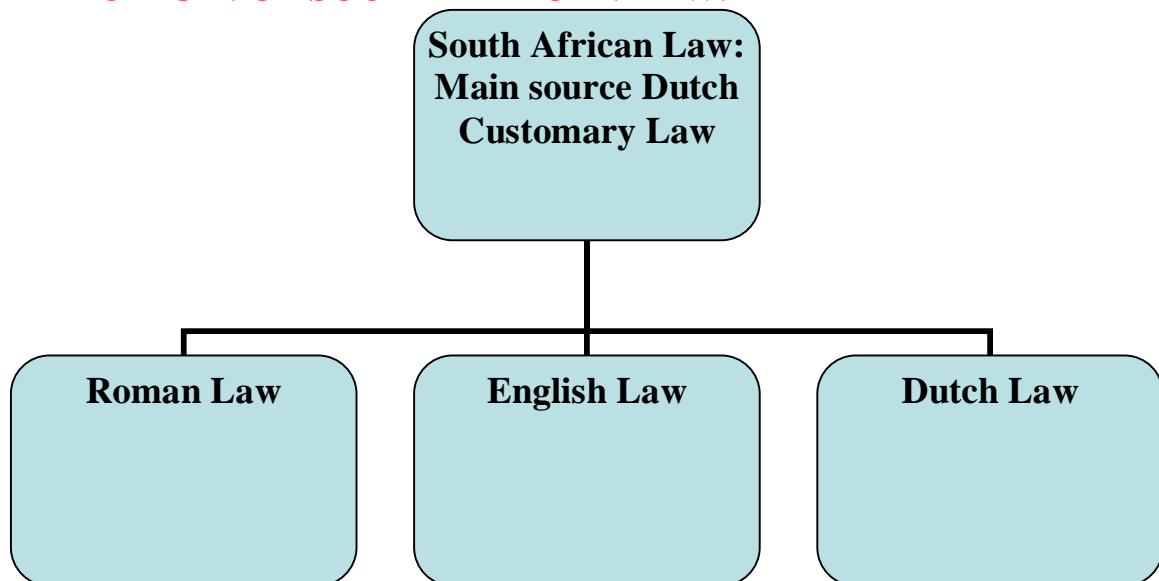
1.1.2 ROMAN DUTCH LAW

After the roman empire fell it did not mean that the law fell basically what happened was that it was preserved due to 2 reasons the 1st being that every person was judged according to his or her own tribe or country therefore roman citizens were judged according to roman law and secondly the church exerted great influence and canon law is based on roman law. Roman law was received in Netherlands and became mixed with Dutch law the founder of roman Dutch law is Hugo de Groot. Roman Dutch law forms the basis of South African Law.

1.1.3 ENGLISH LAW

Jan van Riebeeck brought Roman Dutch Law to the Cape but when the British took over they brought with them English law although roman Dutch law was still in great force English had its effects and became integrated into South African Law examples are the jury system and Master of Supreme court.

NB REFER TO DIAGRAM ON PAGE 3 OF STUDY GUIDE FOR THE ORIGIN OF SOUTH AFRICAN LAW.



SOURCES OF LAW

Two types Authorative which courts are bound by and Persuasive which authority can convince the court to make a rule or interpret in a particular way.

A Legislation is the making of law by a competent (knowledgeable skilled) authority it is one of the most important source of law.

THE CONSTITUTION

The most important source of law in South Africa is the Constitution previously we had supreme parliament now we have a system called constitutional supremacy which means that the Constitution is the supreme law of the Republic. This means if the Parliament were to pass a law that offended the constitution it will be invalid.

The introduction (preamble) of the constitution states that it was developed to:

- (a): heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights**
- (b) Lay the foundations for a democratic and human society in which government is based on the will of people and every person is protected by the law**
- (c) Improve the quality of life of all citizens and free the potential of each person**
- (d) Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.**

The primary method to giving effect to these ideals was through the bill of rights which is the cornerstone of democracy in South Africa and it

confirms human dignity, equality and freedom. Bill of rights applies to all law and the branches of government (legislature, the executive and the judiciary). The State is required to protect, promote and fulfill these rights.

Legislature- a body of persons usually elective who are empowered to make, change, or repeal the laws of a country or state; branch of government having the power to make laws.

Executive branch- person or persons having administrative or supervisory authority in the government

Judiciary- all the judges of the government

Bill of rights has first generation and second generation rights. First generation rights include the rights of equality human dignity etc. second generation rights include the right to housing, health care, food etc. Rights can be limited in special circumstances:

- Limitation must take place by a law of general application
- Must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom
- Limitation must take into account all relevant factors such as nature of right purpose of limitation etc

Constitution regulates government in many ways example financial security

Customary Law

Customary law does not consist of written rules, but develops from the habits of the community and is carried down from generation to generation.

The following requirements must be met before a customary law is made:

- (a) Must be reasonable
- (b) Must have existed for a long time
- (c) Must be generally recognized and observed by a community
- (d) Contents of customary law must be certain and clear

Customary law also called trade usages plays an important role in the business and commercial world.

Judgments of the court

- (a) The South African courts are traditionally divided into superior and lower courts**
- (b) The superior courts are constitutional court, Supreme Court of Appeal and any Division of High Courts.**
- (c) Low courts are those lower than high courts and which require to keep records of their proceedings e.g. Magistrate court and small claim courts**

The Old Authorities

- 1. Works of old writers still form the basis of present day South African Law**
- 2. Works of old jurists of Holland are still authoritative in courts today**
- 3. Roman Law set out in Corpus Iuris Civilis still applies as direct south African law**
- 4. The body of law provided by the old authorities is known as common law**

Foreign Law

Foreign law is not an authoritative law but can be used as a persuasive law it has also been recognized by the constitution and states in the bill of rights that a court of law must consider foreign law.

Textbooks and Law journals

Numerous textbooks and law journals have been written by lawyers, advocates and judges these works have no inherent authority of their own but if they are convincing they can be used by the law

THE COURTS IN THE REPUBLIC

Jurisdiction: the capacity to hear a case and pass a valid judgment. The jurisdiction of the high court is unlimited in the sense that it can hear any case, limited in a way it can only exercise its jurisdiction within a specified area. It can hear constitutional cases except those cases which can only be heard by constitutional court.

COURTS

- 1. The Constitutional court has the jurisdiction of final instance over all matters regarding the constitution. Seat of court in JHB**
- 2. Supreme Court of Appeal jurisdiction unlimited except with the constitutional court matters. Seat of court Bloemfontein**
- 3. High courts have one division in each province can hear jurisdiction which arises in their area of jurisdiction**
- 4. Magistrate courts have very little jurisdiction**

NOTES:

- Registrar in each court responsible for the smooth functioning of the court, duties include process of summonses warrants the enrolment of cases, the issuing of orders of the court and maintenance of records.**
- Sheriffs serve process and execute judgments and orders of the court**
- Master has various administrative and quasi-judicial functions mainly concerned deceases and insolvent estates**

The doctrine and stare decises

The function of the judge is to state, interpret, and apply the existing law but not to make a new law.

A question which is very often asked is that how does a judge made law become an established legal system?

The answer is that sometimes a judicial decision give a new interpretation to a statutory provision which adapts a common law principle and because the later court takes the decisions of the earlier court seriously the judge made law becomes an established legal rule.

Basically what happens is that a judge does not on purpose make a new rule his job is to apply the law however in certain conditions where the law is silent or does not apply to a certain principle it is the judges duty to leave this task to the legislature however a principle of common law can changed if a judge feel is does not apply according to modern views

Application of the doctrine

The word stare decisis means the decision stands when a decision is made it stands but what courts have to see is that how this decision will effect the courts decisions in the future will they have to stick to its old decisions or will they have to formulate their own decisions

Example to understand the application doctrine read and understand carefully:

The example goes like this if the parliament has passed a new Act it could happen that a dispute arises on a meaning of a certain word or phrase in the act. Thereafter a court is called upon to determine or settle the dispute and interprets the word or phrase in a certain way. Its decision is then binding on the parties who brought the dispute before the court.

But the big question is! What if the same word or phrase has to be interpreted by another court.

What option would this court choose:

- 1. Strict adherence to the doctrine of stare decises would mean that the later court would be bound by the earlier decision regardless of whether or not the earlier decision could be regarded as correct. This approach would lead to legal certainty, but would cost a fair decision.**
- 2. Each case should be decided on its own merits and earlier decisions should be ignored while this approach would lead to a more fairer decision it would have a lot of legal uncertainty and this has many disadvantages**

NB!!!! South African courts follow none of these extremes and follow a middle course in this regard

Note: A court is bound by its own decisions unless it is overruled by a superior court but sometimes circumstances arise where a court has to override its own legal opinion the reason being the previous decision was totally wrong.

According to the rule of stare decises courts are bound up to previous decisions because in earlier cases they laid down the rule of stare decises which states that the decision stands.

Hierarchy of courts

- (a) Basically single judge high court bound by two judge bench high court bound by full bench high court bound by supreme court of appeal bound by constitutional court.**
- (b) All courts are bound by their earlier decisions unless it is found that they were totally wrong**
- (c) One court is not bound to follow the decisions of another court because they all have their own jurisdictions**
- (d) Magistrate courts are bound by supreme courts and high courts but it can follow the high court for which jurisdiction it falls under and one magistrate does not follow another magistrate.**

Interpretation of Statutes

This is used when the meaning in law of a word is unclear.

1. The statute requires interpretation.
2. Constitutional principles must be applied in the sense that it must promote values and underline open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.
3. General principles the provision must be determined by its language and context consistent interpretation must be considered over inconsistent interpretation.
4. Any reasonable interpretation of a provision that is consistent with the purpose and scope of that legislation must be preferred over any alternative interpretation that is inconsistent with its purpose and scope
5. Fourthly interpretation Act 33 which has all definitions must be used. Rules about gender, numbering, calculation of time etc

Court Judgements

We can distinguish between two types of important decisions in court, namely **ratio decidendi** and **obiter dicta**

RATIO DECENDI

It is the most important part of the judgement and means the reason of the decision.

That part of reasoning in the judgement which is essential for the decision in the particular case before the judge. The doctrine of stare decises provides that only the ratio decendi is binding on other courts of the hierarchy.

Obiter dictum

Statement of court which does not form part of the ratio. It is not binding but it may have persuasive authority. It is what we call an incidental remark. One could also say the reasons given by a judge in minority judgement are obiter. An important note should be taken once

an obiter dictum which is applied by a later court could become a ratio decendi and a binding decision.

NB EXAMPLE!!!!!! A court may refer to an alternative argument, or it may state what the position would have been had the facts been different.

In National Sorghum Breweries LTD v Corpcapital Bank LTD, the ratio is that the creditor is free to transfer its rights and a non-variation clause in a contract does not restrict this power. Anything else that was said about the lease or sale agreements is obiter, that is a comment that will not be binding in the terms of the doctrine of stare decises

MYNOTE: So the way I see it an ratio decendi is a decision or judgement which is binding on the courts and in terms of the doctrine stare decises and a obiter dictum is a statement which is not a binding decision.

Distinguishing

Basically what happens a judge distinguishes one case from another by deciding that ratio decendi from the previous case is not binding on the case before him and therefore the ratio decendi of the first case does not apply. It is a technique used by the judge to avoid the binding force of an earlier ratio decendi.

This may be done in one of three ways:

- 1. The later court may be of the opinion that the earlier court formulated a principal too broadly, the consequences are unacceptable.**
- 2. The later court may find that the earlier court did not take sufficient account of a fact which would have led to a different ratio decendi, and for this reason may not follow the earlier decision.**
- 3. The later court may accept the earlier court's views and ratios but may find a fact from the later case missing from the earlier case hence the two cases are not identical.**

NOTE: It is only when two cases are identical regarding the material facts and the points in issue that it is impossible to distinguish the one from another.

Important read explanatory notes on pg 8 study guide

END OF STUDY UNIT 1 GOOD LUCK